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Supreme Court, U.S.
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No. 94-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BERT F. SCALES, INDIVIDUALLY AND AS TRUSTEE UNDER THE BERT F. SCALES TRUST 1981, HILMAR R. ZEISSIG, INDIVIDUALLY AND AS TRUSTEE UNDER AGREEMENT DATED SEPTEMBER 1981, DIETER J. SCHERFENBERG AS TRUSTEE UNDER THE 1977 CHILDREN'S TRUST DATED DECEMBER 7, 1977

Petitioners,

v.

THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK ABILENE, N.A.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE

WERE THE PETITIONERS DENIED DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE PETITIONERS WERE DENIED THE TRADITIONAL AND HISTORICAL RIGHT TO A TRIAL ON THE FDIC'S *D'OENCH DUHME* DEFENSE WHICH THE FIFTH CIRCUIT CONSIDERED FOR THE FIRST TIME ON APPEAL AND WHICH THE FIFTH CIRCUIT USED TO BAR THE PETITIONERS' CLAIMS? YES.

QUESTION TWO

WERE THE PETITIONERS DENIED THEIR SEVENTH AMENDMENT RIGHTS WHEN THE PETITIONERS WERE DENIED A TRIAL BY JURY ON THE FDIC'S *D'OENCH DUHME* DEFENSE WHICH THE FIFTH CIRCUIT CONSIDERED FOR THE FIRST TIME ON APPEAL AND WHICH THE FIFTH CIRCUIT USED TO BAR THE PETITIONERS' CLAIMS? YES.

QUESTION THREE

WERE THE PETITIONERS DENIED DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE FDIC SUCCESSFULLY RAISED A *D'OENCH DUHME* DEFENSE FOR THE FIRST TIME ON APPEAL WHERE MBANK ABI-

LENE CONCEALED, AND WERE SANCTIONED FOR OFFENSIVE USE OF A PRIVILEGE, THE VERY BANK EXAMINERS' RECORDS WHICH WOULD HAVE DETERMINED WHETHER THE FDIC'S *D'OENCH DUHME* DEFENSE WAS APPLICABLE? YES.

QUESTION FOUR

DID THE FIFTH CIRCUIT IMPROPERLY CONSTRUE THE CO-EXTENSIVE FIRREA SECTION 1823 (e) AND *D'OENCH DUHME* DEFENSE IN A MANNER WHICH CONCLUSIVELY PRESUMES THAT AN ORAL AGREEMENT IS ALWAYS UNENFORCEABLE? YES

QUESTION FIVE

DOES THE FIFTH CIRCUIT'S CONSTRUCTION OF THE CO-EXTENSIVE FIRREA SECTION 1823 (e) AND *D'OENCH DUHME* DEFENSE INVIDIOUSLY DISCRIMINATE AGAINST THE PETITIONERS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT? YES.

QUESTION SIX

DID THE FIFTH CIRCUIT IMPROPERLY INVOKE FEDERAL COMMON LAW RIGHTS FOR THE FDIC WHICH DO NOT, AND CANNOT, EXIST SUCH THAT ITS HOLDING CONFLICTS WITH THIS COURT'S HOLDING IN O'MELVENY & MYERS V. FDIC, 114 S.CT. 2048 (1994)? YES.

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OPINIONS BELOW

The Fifth Circuit's appealed decision is published at 20 F.3d 654 (5th Cir. 1994). A copy of this opinion is attached as Appendix A. The Fifth Circuit's order overruling the motion for rehearing is unpublished. A copy of this order is attached as Appendix B. The federal district court's order adopting as its own opinion the appellate opinion of the Fourteenth Court of Appeals at Houston is unpublished. A copy of this order is attached as Appendix

C. The Fourteenth Court of Appeals at Houston's appellate opinion is unpublished. A copy of this opinion is attached as Exhibit D. The trial court's Final Judgment is unpublished. A copy of the Final Judgment is attached as Appendix E.

JURISDICTION

This Court should invoke its jurisdiction to correct the Fifth Circuit's holding which conflicts with this Court's settled holdings and which achieves an unconstitutional result.

The Fifth Circuit entered its decision and judgment on May 17, 1994. It denied a motion for rehearing on June 24, 1994. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution Amendments Five, Seven and Fourteen. A copy of each provision is attached as Appendix F.

12 U.S.C. Sections 1811 *et seq.*, The Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"). The provisions of FIRREA are too lengthy to incorporate. A copy of relevant FIRREA subsections are attached as Appendix G.

STATEMENT OF THE CASE

A. Proceedings in the Texas Trial Court:

On June 19, 1986, after a five (5) week trial, a Fort Bend County, Texas jury returned a verdict in excess of $69,000,000 for Harry Lemaire ("Lemaire"), Richard Patton ("Patton"), Bert F. Scales, Individually and as Trustee for

the Bert F. Scales 1981 Trust ("Scales"), Hilmar R. Zeissig, Individually and as Trustee ("Zeissig") and Dieter J. Scherfenberg as Trustee for the 1977 Children's Trust ("Scherfenberg") against MBank Abilene, N.A. ("MBank Abilene"). The jury found that MBank Abilene breached its direct and third party contract, that MBank Abilene engaged in fraud, that MBank Abilene violated the Texas Deceptive Trade Practices-Consumer Protection Act, Texas Business and Commerce Code Sections 17.41 *et seq.* ("DTPA"), that MBank Abilene had tortiously interfered with Lemaire's and Patton's contractual rights and that MBank Abilene had libeled Lemaire and Patton. On August 12, 1986, the 240th District Court, Fort Bend County, Texas, signed a Final Judgment.

The FDIC was not a party to the jury trial. The FDIC's examination of the Petitioners' claim was not considered during trial. The Petitioners did seek pre-trial production of the bank examination records for the documentation of their loan contract. MBank Abilene refused to produce the documents based upon an alleged privilege. The trial court sanctioned MBank Abilene for their non-production. MBank Abilene still concealed these documents. The Petitioners and the jury did not have an opportunity to review these documents.

B. Proceedings Before the Fourteenth Court of Appeals at Houston:

On September 26, 1986, MBank Abilene perfected an appeal of the Final Judgment to the Fourteenth Court of Appeals at Houston. MBank Abilene would then ask for nine (9) extensions to file its brief. The briefing was not completed until the Summer of 1988.

On March 28, 1989, the Office of the Comptroller of the Currency declared MBank Abilene insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as MBank Abilene's receiver. Nine (9) days later, on April 6, 1989, the Fourteenth Court of Appeals issued its Judgment and Opinion.

The Fourteenth Court of Appeals upheld Patton and Lemaire's recovery on their breach of contract claim which Scales, Zeissig and Scherfenberg were the third party beneficiaries and on Patton and Lemaire's promissory estoppel claim. It inexplicably reversed Scales, Zeissig and Scherfenberg's recovery on their third party beneficiary claims. It further reversed Scales, Zeissig and Scherfenberg's recovery on their fraud claim based upon limitations. It rejected Scales, Zeissig and Scherfenberg's limitations argument which would subsequently be adopted by the Texas supreme court in Khalaf v. Williams, 814 S.W.2d 854 (Tex. 1991). It reversed Scales, Zeissig and Scherfenberg's recovery under all other claims except for their recovery of attorneys' fees. Its holding is uncontrovertedly wrong in at least three regards.

Scales, Zeissig and Scherfenberg prepared to move for a rehearing. Before such a motion could be filed, on April 20, 1989, the FDIC substituted as the real party in interest in lieu of MBank Abilene. On the same day, the FDIC, solely under FIRREA, removed the case to federal district court for the Southern District of Texas, Houston Division.

C. Proceedings Before the United States District Court: **The federal district court initially deferred any further proceedings until the Fifth Circuit could decide the then long pending case of Matter of Meyerland Co., 910 F.2d 1257 (5th Cir. 1990) which would decide whether the FDIC could**

remove, under FIRREA, while a case is on appeal. The Fifth Circuit, *en banc*, ultimately held in Matter of Meyerland, 960 F.2d 512, 516-517 (5th Cir. 1992) that FIRREA allows for removal on appeal.

On July 16, 1992, the federal district court upheld its jurisdiction. The federal district court then adopted the Judgment and Opinion of the Fourteenth Court of Appeal for purposes of federal appellate jurisdiction.

During the interim, Lemaire and Patton settled with the FDIC. Scales, Zeissig and Scherfenberg were the remaining parties and are the Petitioners in this Court.

D. Proceedings before the Fifth Circuit:

On January 21, 1993, Scales, Zeissig and Scherfenberg perfected their notice of appeal. The FDIC then perfected its notice of appeal on February 16, 1993.

In their original brief, Scales, Zeissig and Scherfenberg raised three issues: the federal district court and the Fourteenth Court of Appeals wrongfully overturned their fraud recovery based upon limitations when the Texas supreme court had ruled adversely to the federal district court and the Fourteenth Court of Appeals' holding; the federal district court and the Fourteenth Court of Appeals failed to recognize or address the Petitioners' unrefuted right to recover as third party beneficiaries to Patton and Lemaire's affirmed contract; and that the federal district court and the Fourteenth Court of Appeals wrongfully applied the statute of frauds to bar a portion of their recovery.

The FDIC responded to these issues in its reply brief. The FDIC raised a *D'Oench Duhme* defense (i.e. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) and progeny) for the very first time.

On May 17, 1994, the Fifth Circuit issued its decision. It ignored all other appellate bases and addressed only the application of the FDIC's *D'Oench Duhme* defense raised for the first time on appeal. It held that the defense could be raised for the first time on appeal and summarily ruled that its application totally barred Scales, Zeissig and Scherfenberg's claims.

Scales, Zeissig and Scherfenberg moved for a rehearing based upon the Fifth Circuit's misapplication of the *D'Oench Duhme* defense in the absence of any factual record relating to that defense. They later sought to supplement their motion for rehearing to call the Fifth Circuit's attention to this Court's opinion in O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994).

On June 24, 1994, the Fifth Circuit overruled the motion for rehearing.

REASONS FOR GRANTING

The Fifth Circuit denied the Petitioners' fundamental due process, equal protection and property rights when it summarily dismissed the Petitioners' claim based upon the FDIC's application of the *D'Oench Duhme* defense for the first time on appeal. Unlike if the FDIC first raised this defense before trial, the Petitioners were never provided an opportunity to discover facts regarding the defense and to test the discovered facts at trial.

The claim barred by the Fifth Circuit is based upon a loan agreement that was tried before a jury and found valid. The *D'Oench Duhme* common law defense was not raised at trial nor at the time judgment for Petitioners was entered.

The Petitioners had sought pretrial discovery of bank examiner's records to document their loan agreement, but MBank Abilene had denied production based upon an asserted privilege. Though MBank Abilene was sanctioned for the non-production, there was never any consideration given by the jury to what the examiners knew about Petitioners' claim as a result of their review of bank records.

Two years later, the FDIC substituted in this matter while the judgment was under review by the state court of appeals. The FDIC removed the matter and asserted the *D'Oench Duhme* common law defense for the first time. The Fifth Circuit subsequently and summarily denied all relief to the Petitioners based solely upon an application of *D'Oench Duhme* and ignored without comment all other basis for the appeal.

The Petitioners were never given an opportunity to develop or submit a response to the common law defense. If the defense had been raised for the first time before trial, they would have been given that right. There is no just reason why the result should be different because the defense was raised for the first time on appeal.

The Fifth Circuit presumed it is irrebuttable that a claim which was originally based upon an oral loan agreement can never be held valid against the FDIC. The Fifth Circuit impermissibly created an irrebuttable presumption that the Petitioners could never sufficiently document their claim in the bank's records to fully apprise bank examiners of the existence of their claim.

The Fifth Circuit turned a blind eye to the fact that examiners would have noted in MBank Abilene's records at the time of its failure, that the Petitioners claim had been reduced to a judgment, that the judgment had been the subject of four separate garnishment lawsuits and that it had been the subject of a lawsuit by the United States of America to enjoin further collection efforts by the Petitioners. The Fifth Circuit refused to consider the significance of the denial of the Petitioners' pretrial discovery request for bank examination materials or the possibility of other germane facts that could be discovered.

The FDIC was able to raise the *D'Oench Duhme* common law defense for the first time during appeal as the sole result of its invocation of authority to remove the case provided by FIRREA. FIRREA does not, however, provide for the FDIC to raise this common law defense for the first time on appeal. The Fifth Circuit's decision conflicts with this Court's opinion in *O'Melveny*.

DISCUSSION UNDER QUESTIONS ONE, TWO, AND THREE

The Petitioners simply seek the traditional and historic due process of a jury trial, after regular procedure, on the facts relevant to the elements of the FDIC's *D'Oench Duhme* defense. The FDIC won by summary appellate process without ever having to test its defense in the time honored crucible of a jury trial, bench trial or summary judgment procedure. The FDIC successfully indulged the *D'Oench Duhme* defense as a total bar to the Petitioners' claims for the first time on appeal even though the facts relevant to that defense were not, and could not be, considered during the actual jury trial. The Petitioners were denied due process.

Due process is a flexible, practical process. **Mathews v. Eldridge**, 424 U.S. 319, 96 S.Ct. 843, 47 L.Ed.2d 18, 32-33 (1976). Due process is defined by historic and traditional process. **Honda Motor Co., Ltd. v. Oberg**, ___ U.S. ___, 114 S.Ct. 2331, 2339, 129 L.Ed.2d 336(1994).

Historical and traditional process for judicial proceedings, other than summary proceedings, includes an "actor, reus, judex, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding." Den v. The Hoboken Land and Development Co., 18 Howard 272, 15 L.Ed. 372 (1856). Historical and traditional process for even summary proceedings requires an ultimate judicial determination under regular trial practice although the timing of that judicial determination may vary depending upon the nature of the summary proceeding. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751, 759 (1975)(J. Stewart concurring); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289, 1297 (1931); see also, United States v. James Daniel Good Real Property, ___ U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490, 504-505 (1993), Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) and Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

Historical and traditional process for the determination of the FDIC's *D'Oench Duhme* defense thus required that the defense be raised by regular allegation, that the Petitioners have a right to respond, that the Petitioners have a right to compel production of the documents relevant to the defense and that there be a trial on each element of the defense.

The Petitioners should have been able to discover and then proffer evidence on what a prudent bank examiner would have known about MBank Abilene's loan commitment from an examination of MBank Abilene's records, Fair v. NCNB Texas National Bank, 733 F. Supp. 1099, 1105 (N.D. Tex. 1990). At a minimum, the Petitioners should have been allowed to discover and then proffer evidence whether the loan commitment was properly examined and whether the bank examiners were misled. **Lemaire**, 20 F.3d at 657; **RTC v. Montross**, 944 F.2d 227, 228 (5th Cir. 1991)[*D'Oench Duhme* attempts to insure that the FDIC examiners can accurately assess the failed bank's condition at the time of insolvency]; **Bell & Murphy & Associates v. Interfirst Bank Gateway**, 894 F.2d 750, 753 (5th Cir. 1990)[the relevant inquiry is what the bank examiners could have discovered from the failed bank's records]; **Grubb v. FDIC**, 865 F.2d 1151, 1159 (10th Cir. 1989)[judgment in record provided reliable record germane to *D'Oench Duhme* analysis].

The lower federal courts have usually recognized this process. **See**, **Park Club, Inc. v. Resolution Trust Corp.**, 967 F.2d 1053, 1056-1058 (1992)[summary judgment for the FDIC was reversed and remanded for a jury trial on the FDIC's *D'Oench Duhme* defense]. One court upheld the constitutionality of the *D'Oench Duhme* defense only because such a process exists. **RTC v. Daddona**, 9 F.3d 312, 321 (3rd Cir. 1993).

The Petitioners have never been afforded this process. The FDIC raised the *D'Oench Duhme* defense for the first time on appeal. The FDIC was not substituted as a party until the appeal and thus the *D'Oench Duhme* defense was not germane to the actual jury trail.

The Petitioners should be able to develop the full factual record at trial. The record to be developed at trial would show that the Petitioners' claim had been fully litigated to a judgment for almost two years before MBank Abilene failed. Prior to obtaining the jury and trial's court finding that they had a valid and enforceable agreement, the Petitioners had sought bank examination of records that would document their loan agreement claim. The record shows that the Petitioners were rebuffed in their discovery requests by MBank Abilene's assertion of a privilege from production. The privilege assertion was ultimately the subject of a sanction levied against MBank Abilene by the trial court.

After reducing their claim to a judgment, that judgment was the subject of four separate garnishment lawsuits and an independent lawsuit by the United States of America to enjoin further collection efforts by the Petitioners. The Petitioners believe that at the time of MBank Abilene's failure, the bank's records would fully disclose their claim and its basis to any prudent bank examiner. As a result, the requirements of *D'Oench Duhme* would be fully satisfied.

There may be other germane facts to discover, but the Petitioners will not know until they have the chance to do so. The Petitioners seek their fundamental right to discover such facts in the context of a raised *D'Oench Duhme* defense.

The Fifth Circuit indulged the FDIC's *D'Oench Duhme* defense even though the facts underlying that defense were not decided by the jury. It found that *D'Oench Duhme* applied as a total bar based upon an incomplete factual record. It allowed the FDIC the offensive benefit of privilege: MBank Abilene could conceal the bank examiners' records regarding the loan commitment and the FDIC could rely upon the absence of those records to raise the *D'Oench Duhme* defense for the first time on appeal.

Since the Petitioners did not receive the traditional and historical process, the Petitioners were denied due process. Oberg, 114 S.Ct. at 2341. Since the Petitioners were not provided any equivalent substitute process, they were denied due process. Id.

The Petitioners received arbitrary justice divorced from regular process. There are no policy reasons which support that.

First, this Court has strongly indorsed the Fifth and Fourteenth Amendments' due process clauses as preeminent constitutional protections which should not be relegated to poor relation status to the other rights under the Bill of Rights. **Dolan v. City of Tigard**, ___ U.S. ___, 114 S.Ct. 2309, 2320, 129 L.Ed.2d 304 (1994); **James Daniel Good Real Property**, 114 S.Ct. at 500-502. The Petitioners invoke traditional and historically tempered process which should not be modified.

Second, this Court has recognized and strongly enforced historically cognizable process and rights. **Oberg**, 114 S.Ct. at 2335-2338; **City of Ladue v. Gilleo**, ___ U.S. ___, 114 S.Ct. 2038, 2047, 129 L.Ed.2d 36 (1994); **Michael H. v. Gerald D.**, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91, 107-111 (1990). The Petitioners invoke such process and rights which should not be modified.

Third, the Petitioners ask for no greater process than that which would apply had the FDIC substituted for MBank Abilene before the jury trial. There is no rational or legitimate basis to have two (2) distinct processes, one applicable for trial and one applicable for appeal, regarding the same defense.

Fourth, the FDIC's suggested jeremiad that its status as receiver of a failed bank deserves some special treatment should fall on deaf ears as "... administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." **Cleveland Board of Education v. LaFleur**, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52, 64 (1974). The FDIC's *D'Oench Duhme* defense provides the FDIC with unprecedented, overwhelming powers which are only constrained by historical and traditional due process. This Court should not tamper with that process and leave the FDIC unfettered in its right to trample on the Petitioners' claims.

Fifth, the Fifth Circuit, on convenience grounds, further indulged the FDIC's *D'Oench Duhme* defense for the first time on appeal because that was when the FDIC could first raise the defense. Yet, in doing so, it failed to extend the Petitioners the normal process regarding any defense: a trial. It rotely applied Fifth Circuit precedent, e.g.: McMillan v. MBank Fort Worth, N.A., 4 F.3d 362, 368 (5th Cir. 1993); Matter of 5300 Memorial Investors, Ltd., 973 F.2d at 1163-1164, without regard for the due process underpinning of that precedent, namely the FDIC may raise the *D'Oench Duhme* defense for the first time on appeal, if at all, if it is *purely* a legal matter and no further development of the factual record is required. In Re 604 Columbus Avenue Realty Trust, 968 F.2d 1332, 1343-1344(1st Cir. 1992)[cited in 5300 Memorial Investors, 973 F.2d at 1164 fn. 1].

Sixth, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." James Daniel Good Real Property, 114 S.Ct. at 505 [citing Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 fn. 5 (1991)]. The Court should scrutinize the FDIC's invocation of the *D'Oench Duhme* defense for the first time on appeal without providing the Petitioners with the concomitant right to have a trial on that defense. The Fifth Circuit obsequiously provided the FDIC with every opportunity to raise the *D'Oench Duhme* defense and trenchantly denied the Petitioners any cognizable process to challenge this defense. This asymmetric result is absurd.

This Court should reverse the Fifth Circuit. It should remand this case to the Fifth Circuit with instructions to remand this case for trial before a jury.

ARGUMENT UNDER QUESTIONS FOUR AND FIVE

The Fifth Circuit found that the Petitioners' claims were barred by the *co-extensive D'Oench Duhme* and FIRREA Section 1823(e) defense simply because the Petitioners initially relied upon an oral loan commitment. The Fifth Circuit presumed, without providing the Petitioners with the right to a trial on the *D'Oench Duhme* defense, that the Petitioners' claims subsequently reduced to a judgment could never override the *D'Oench Duhme* defense. The Fifth Circuit indorsed an impermissible irrebuttable presumption. Moreover, the Fifth Circuit would not have indulged the same presumption had the FDIC substituted as a party before the jury trial. It thus also invidiously discriminated against the Petitioners.

Irrebuttable presumptions are disfavored and often are unconstitutional. **LaFleur**, 39 L.Ed.2d at 62-64; **Stanley v. Illinois**, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 551 (1972). They are unconstitutional when there is an inadequate "fit" between the classification created by a presumed fact and the policy underlying the presumed fact in the first place. **Michael H.**, 105 S.Ct. at 104. Stated differently, they are unconstitutional when they create procedures where similarly situated persons are treated differently based upon suggested demarcation lines which are neither universally nor necessarily true. **Vlandis v. Kline**, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63, 71 (1973).

The Fifth Circuit's conclusion that the *D'Oench Duhme* defense must bar the Petitioners' claims is neither universally nor necessarily true. Except as applied to the

Petitioners' case, the *D'Oench Duhme* defense is inapposite to loan commitments which are disclosed by an examination of MBank Abilene's records. The Fifth Circuit acknowledged this concept and then promptly ignored it. Lemaire, 20 F.3d at 657.

The net result of the Fifth Circuit's approach was to deny the Petitioners the right to try the elements of the *D'Oench Duhme* defense. Inexplicably, the Petitioners would not have been denied that right had the FDIC substituted as a party prior to the jury trial. The Fifth Circuit treated the Petitioners differently because the FDIC was for the first time added as a party on appeal. There is no logical or legitimate basis to provide full process to parties if the FDIC fortuitously substitutes as a party before the jury trial and to deny full process to parties if the FDIC substitutes as a party for the first time on appeal. This is a wholly arbitrary and capricious basis to deny the Petitioners their fundamental due process rights.

The Fifth Circuit's fundamental error probably derives from its belief that the *D'Oench Duhme* defense cannot constitute an irrebuttable presumption because the Petitioners could have known of the defense and could have taken steps to satisfy its requirements. Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1248 (5th Cir. 1990); FSLIC v. Griffin, 935 F.2d 691, 698-699 (5th Cir. 1991). In Campbell Leasing, the Fifth Circuit relied upon this Court's opinions in United States v. Locke, 471 U.S. 84, 105 S.Ct. 785, 85 L.Ed.2d 64 (1985) and Texaco, Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) to find that the *D'Oench Duhme* defense was constitutional. Campbell Leasing, 901 F.2d at 1248. Locke and Short, however, are not irrebuttable presumption cases. They are forfeiture cases. E.g.: Locke, **85 L.Ed.2d at 81.** Furthermore, this belief would beg the question because the Petitioners had taken steps to satisfy the requirements of *D'Oench Duhme* by causing their claim to be reduced to a judgment.

The Fifth Circuit has basically misapplied this Court's precedents. Even if it has not, Locke and Short articulate a straightforward rule: a forfeiture is not unconstitutional if the forfeiting party could have satisfied the requirements to avoid forfeiture. That is simply what the Petitioners seek. They want the traditional and historical process to test the FDIC's *D'Oench Duhme* defense in the crucible of a jury trial. They want to show that by litigating to a judgment, the Petitioners had placed a document in the bank's records they would not have allowed bank examiners to be mislead. There was no secret agreement that could have mislead bank examiners at the time of the MBank Abilene's failure. They want the opportunity to show, after full discovery and the development of the facts, that the *D'Oench Duhme* defense is inapposite. The Fifth Circuit erroneously denied them a fundamental right based upon a presumption that the Petitioners were never allowed to address properly. The Fifth Circuit invidiously discriminated against the Petitioners by treating them differently, as appellants, than it would have had they been trial litigants. There is no rational basis for this discrimination. There is no compelling basis for this discrimination.

This Court should reverse the Fifth Circuit. It should remand this case to the Fifth Circuit with instructions to remand this case for trial before a jury.

ARGUMENT UNDER QUESTION SIX

The Fifth Circuit clothed the FDIC with federal common rights not expressly or otherwise embraced by FIRREA. The Fifth Circuit vested the FDIC with rights which do not, and cannot, exist.

This Court recently has emphatically re-affirmed that there is no federal common law embracing the FDIC's rights and remedies as a receiver for a failed bank, such as MBank Abilene. **O'Melveny & Myers v. FDIC**, ___ U.S. ___, 114 S.Ct. 2048, 2053, 129 L.Ed.2d 67 (1994). It stated that the FDIC is not the United States Government in the first place and that FIRREA defines the FDIC's rights and remedies in the second place. **Id.** at 2053-2054. It further stated that the FDIC steps into the shoes of the failed institution and thereafter claims against the failed institution are also good against the FDIC. **Id.** at 2054. It expressly rejected a federal common law to amend or to supplement the FDIC's rights under FIRREA. **Id.**

The Fifth Circuit affirmed the FDIC's removal of this case on appeal under its decision in **Matter of Meyerland**, 960 F.2d 512 (5th Cir. 1992). As such, the lower federal courts had this case on appeal "... in the same condition in which it left the state system." **Id.** at 520. That meant that the FDIC could **not** raise the *D'Oench Duhme* defense for the first time on appeal. **Larsen v. FDIC**, 835 S.W.2d 66 (Tex. 1992).

The FDIC, however, was allowed to raise the co-extensive FIRREA Section 1823(e) and *D'Oench Duhme* defense for the first time on appeal. The Fifth Circuit did so out of federal comity and common law and not as a result of FIRREA's text, as the Fifth Circuit recognizes that FIRREA itself does not allow the FDIC to raise co-extensive FIRREA Section 1823(e) and *D'Oench Duhme* defense for the first time on appeal. **5300 Memorial Investors**, 873 F.2d 1160, 1164 (5th Cir. 1992)[citing: **In Re 604 Columbus Avenue Realty Trust**, 968 F.2d 1332, 1342-1344 (1st Cir. 1992)].

The Fifth Circuit's holding conflicts with O'Melveny. The FDIC cannot rely upon the co-extensive FIRREA

Section 1823(e) and *D'Oench Duhme* defense for the first time on appeal.

CONCLUSION

This Court should reverse the Fifth Circuit. It should remand this case with instructions to the Fifth Circuit to review the merits of the appellate judgment without reference to the co-extensive FIRREA Section 1823(e) and *D'Oench Duhme* defense which cannot be raised for the first time on appeal.

Respectfully submitted,

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ATTORNEYS PETITIONERS

APPENDIX A

Harry LEMAIRE, et al., Plaintiffs,

Hilmar R. Zeissig, et al., Plaintiffs-Appellants,
Cross-Appellees,
v.
The FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBank Abilene, N.A., Defendant-Appellee,
Cross-Appellant,

and

The Deposit Insurance Bridge Bank,
N.A., Intervenor-Defendant
Appellee-Cross-Appellant.

No. 93-2144.

United States Court of Appeals,
Fifth Circuit.

May 17, 1994

Rehearing Denied June 24, 1994.

Owners of corporation brought suit in state court against bank for breach of oral promise by bank's chief executive offerer to loan $3 million to corporation. After jury returned verdict for plaintiffs and state trial court rendered judgement on verdict against bank for approximately $69 million, bank appealed. Bank failed while appeal was pending, and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver. The Texas Court of Appeals subsequently rendered judgement reversing or vacating and remanded for retrial, leaving intact only attorney fee award.

FDIC filed notice of substitution and removed case. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., adopted judgement of the Texas Court of Appeals, and plaintiffs appealed, seeking to reinstate fraud and breach of contract recoveries. FDIC cross-appealed, seeking to set aside attorney fee award. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) FDIC could assert *D'Oench Duhme* doctrine for the first time on appeal to defend against attack on judgement in favor of failed bank, where FDIC had no opportunity in trial court to present defense against attempt to enforce oral agreement; (2) *D'Oench Duhme* doctrine was applicable to bar claims predicated on bank officer's oral promise to loan plaintiffs $3 million; and (3) because all of plaintiffs' underlying claims were barred, award of attorney fees would be reversed.

Affirmed in part, reversed in part

1. Removal of cases

Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, could raise *D'Oench Duhme* doctrine for the first time on appeal to defend against attack on state appellate decision, adopted by federal district court after removal, that favored failed bank on the merits, where FDIC was appointed receiver after state trial court judgement, and thus did not have opportunity to present its defense at trial level. Federal Deposit Insurance Act, § 2[13], as amended, 12 U.S.C.A. § 1823.

2. Banks and Banking

Under the *D'Oench Duhme* doctrine, party cannot rely on oral agreement between failed bank's customer and bank as basis for defense or claims against the Federal

Deposit Insurance Corporation (FDIC). Federal Deposit insurance Act, § 2[13], as amended, 12 U.S.C.A. § 1823.

3. Banks and Banking

claims against failed bank predicated on bank officer's oral promise to loan claimants $3 million were barred under the *D'Oench Duhme* doctrine, notwithstanding that at time bank failed and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver, examination of bank's records would have revealed judgement liability based on oral promise. Federal Deposit Insurance act, § 2[13], as amended. 12 U.S.C.A. § 1823.

4. Federal Civil Procedure

Attorney fees are not recoverable by parties who do not prevail on their cause of action.

John M. Zukowski, Maurice Bresenhan, Jr., Campbell, Zukowski, Bresenhan & Woods, Houston, TX, for appellants.

Paul C. Wolf, Dallas, TX, For F.D.I.C.

Appeal from the United States District of Texas.

Before GOLDBERG, DAVIS and DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Hilmar Zeissig, Deiter Scherfenberg and Bert Scales appeal the district court's order adopting the Texas Court of Appeal's judgement reversing most of the state trial court's judgement in Appellants' favor. Because all of Appellant's claims are barred by the *D'Oench Duhme* doctrine, we affirm that portion of the district court judgement denying Appellants recovery on their underlying claims and reverse the district court's grant of attorneys' fees.

I.

This appeal grows out of a lender liability action against MBank Abilene ("MBank"), formerly known as Abilene National Bank ("ANB"), for breach of an oral loan promise. Harry Lemaire and Richard Patton originally brought suit in Texas state district court in 1984, and Appellants Zeissig, Scherfenberg and Scales ("Appellants") later joined the suit as plaintiffs.

The petition alleged that in 1982, Don Earney, ANB's chief executive officer, chairman of the board, and majority stockholder, orally promised to loan $3 million to Lingen Energy Corporation, an entity owned by Lemaire, Patton and Appellants. Lingen intended to use the loan to finance its oil and gas drilling program. ANB never funded the loan, and Lingen ultimately failed because it was unable to finance its drilling program.

In 1986, after a five week trial, the trial court submitted the case to the jury on theories of breach of contract, promissory estoppel, fraud, tortious interference with business relations, defamation, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). The jury returned a verdict for the plaintiffs, and the trial court rendered a judgement on the verdict against MBank for approximately $69 million. MBank then appealed to the Texas Court of Appeals for the Fourteenth District.

On April 6, 1989, the Texas Court of Appeals rendered its judgment. With respect to Appellants, the court reversed and rendered take nothing judgments on the breach of contract claims; it also reversed and remanded for retrial the fraud and tortious interference claims,[1] and reversed and remanded for retrial one DTPA claim but reversed and rendered take nothing judgments on the remaining DTPA claims[2] The court also affirmed the trial court's award of attorneys' fees to all plaintiffs. Thus, the only portion of the Appellants; judgment that remained intact after the Texas Court of Appeals decision was the attorneys' fees award. The remainder of the judgment was either reversed outright or vacated and remanded for retrial.

On March 28, 1989, nine days before the Texas Court of Appeals rendered its judgment, MBank failed, and the FDIC was appointed receiver. On April 20, the FDIC filed a Notice of Substitution and removed the case to federal court.

Ultimately, on January 19, 1993, the district court adopted as its own judgment the judgment of the Texas Court of Appeals.[3] Thereafter, Patton and Lemaire settled their claims against the FDIC. [4] Appellants filed this appeal, seeking to reinstate their fraud and breach of contract recoveries. The FDIC, as cross-appellant, seeks to set aside the attorneys' fees awards.

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[1] The court rendered a take nothing judgment on Scales' fraud claim.

[2] The court affirmed Patton and Lemaire's recovery under a theory of promissory estoppel, reversed and remanded their fraud and tortious interference claims, reversed and rendered take nothing judgment on their defamation claim, and reversed and remanded tow DTPA claims but rendered a take nothing judgment on the remaining DTPA claims.

[3] The district court followed the procedure for cases that are removed from state courts of appeal adopted in *In re Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992)(en banc).

[4] The terms of this settlement are not on the record nor are they relevant to this appeal.

II.

[1] The FDIC argues for the first time on appeal that Appellants' claims are barred by the doctrine of *D'Oench Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) and that doctrine's codification in 12 U.S.C. § 1823.[5] This court generally will not hear arguments not raised first in the district court. *U.S. v. Villarreal*, 920 F.2d 1218, 1222 (5th Cir. 1991). However, if "the FDIC had neither opportunity nor occasion to assert the *D'Oench* doctrine in the trial court," we will ordinarily consider this argument on appeal. *Union Fed. Bank of Indianapolis v. Minyard*, 919 F.2d 335, 336 (5th Cir. 1990).

We have held that the *D'Oench Duhme* doctrine may be raised for the first time on appeal "in circumstances where the FDIC succeeds to the bank's interest in a judgment in the bank's favor which the promisor seeks to avoid based on an oral understanding." *FDIC v. Hadid*, 947 F.2d 1153, 1157 (4th Cir. 1991) (policy behind *D'Oench Duhme* would be frustrated if the FDIC could not defend against an attack made to overturn a judgment favorable to the bank based on an oral understanding); *McMillan v. MBank Fort Worth, N.A.*,4 F.3d 362, 368 (5th Cir. 1993) (FDIC-Receiver can raise defense for first time on appeal when it is urging the affirmance of a favorable judgment that it inherited as an asset when it became Receiver); *In re 5300 Memorial Investors, Ltd.*, 973 F.2d 1160, 1164 (5th Cir. 1992) (same). Here, the FDIC is seeking an affirmance of the Texas Court of Appeals judgment that favors the failed institution on the merits.

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[5] Appellants argue that § 1823(e) does not apply in this action because at the time this litigation was reduced to judgment and at the time the Bank failed, § 1823(e) did not apply to the FDIC acting in its capacity as receiver. The statute was amended to include the FDIC as receiver in August, 1989. See Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, 103 Stat. 183. However, we need not consider whether the statute applies retroactively because we have long held that both the statutory and common law doctrines bar similar defenses and claims. See *Resolution Trust Corp. v. Camp*, 965 F.2d 25, 31 (5th Cir. 1992);*Kilpatrick v. Riddle*, 907 F.2d 1523, 1526 n. 4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991).

Appellants argue that when federal regulators are appointed after entry of judgment, they are not allowed to assert *D'Oench Duhme* for the first time on appeal. *Thurman v. FDIC*, 889 F.2d 1441, 1447 (5th Cir. 1989). In *Thurman*, the FSLIC, in its corporate capacity, was assigned promissory notes by the FSLIC-Receiver after a final judgment forfeiting the notes had been rendered in the trial court. *Id.* at 1443. This court did not allow the FSLIC, in its corporate capacity, to raise *D'Oench Duhme* on appeal as a post-judgment intervenor because the assets were void prior to the receivership. The new defense would not have changed the outcome of the case as it was tried. *Id.* at 1447.

Here, however, the FDIC does not seek to enforce an asset that became void before the appointment of the FDIC as receiver. Instead, the FDIC seeks to defend from Appellants' attack the Texas Court of Appeals judgment adopted by the district court. Appellants' reliance on *Thurman* is misplaced. While this court in *Thurman* refused to permit the FDIC to raise *D'Oench Duhme* for the first time on appeal to reverse a judgment that rendered assets void, we do allow the FDIC to raise the doctrine on appeal to defend against an attack on a judgment.[6]

Appellants had no vested right in the state trial court judgment because it was subject to appeal and, as it turns out, most of it was reversed outright and the remainder was vacated and remanded. The FDIC did not have an opportunity in the trial court to present its defense against the plaintiffs' attempt to enforce an oral agreement. This is the FDIC's first opportunity to present the *D'Oench Duhme* defense and it does so as an alternative ground to affirm the judgment in the bank's favor. We conclude, therefore, that the FDIC is entitled to assert its rights under *D'Oench Duhme*.

III.

[2] Under the *D'Oench Duhme* doctrine, a party cannot rely on an oral agreement between the bank's customer and the bank as the basis for defenses or claims against the FDIC. It is uncontroverted that the claims in this suit are predicated on Earney's oral promise to loan Appellants $3 million. The oral promise was never put in writing. *D'Oench Duhme* renders such a promise unenforceable. *Bowen v. FDIC*, 915 F.2d 1013 (5th Cir. 1990) (oral promise to make a loan not enforceable against the FDIC); *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989) (same).

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[6] The Eleventh Circuit has even allowed the RTC to raise *D'Oench Duhme* for the first time on appeal to attempt to reverse a trial court judgment. The court held that because the RTC was not a party to the suit when the case was tried, it should not be penalized for not raising a defense it had no opportunity to present. *Baumann v. Savers Federal Sav. & Loan Assoc.*, 934 F.2d 1506 (11th Cir. 1991), cert. denied, — U.S. —, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992).

[3] Appellants argue that *D'Oench Duhme* does not apply because at the time MBank failed and the FDIC was appointed receiver, examination of MBank's records would have revealed a judgment liability. Thus, Appellants argue that the FDIC would not have been misled as to the value of any assets or liabilities of the failed institution.

However, whether the regulator had actual knowledge is not relevant. The Supreme Court has expressly rejected the argument that the receiver's knowledge renders *D'Oench Duhme* inapplicable:

> Harm to the FDIC ... is not avoided by knowledge at the time of acquiring the note. The FDIC is an insurer of the bank, and is liable for the depositors' insured loss whether or not it decides to acquire the note. The harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts it first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available measures, including termination of the bank's deposit insurance.

Langley v. FDIC, 484 u.s. 86, 94-95, 108 S.Ct. 396, 403, 98 L.Ed.2d 340 (1987). In applying *D'Oench Duhme*, the relevant inquiry is whether the individual or institution lent itself to a transaction that is likely to mislead banking authorities. *McMillan v. MBank Fort Worth, N.A.*, 4 F.3d at 368 n. 12. The focus is on the transaction between the bank and the borrower, not on the knowledge of the FDIC.

D'Oench Duhme is meant to ensure more than just that the bank's records are reliable. A second purpose is to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley*, 484 U.S. at 91-92, 108 S.Ct. at 401. If the transaction is not properly examined and recorded, *D'Oench Duhme* applies. *McMillan*, 4 F.3d at 368.

Earney's oral promise to make a loan was never recorded or properly examined. Therefore, the appellants' claims are all barred by *D'Oench Duhme*.

[4] Because all of Appellants underlying claims are barred, the award of attorney fees must be reversed. Attorney fees are not recoverable by parties who do not prevail on their cause of action. *Jay-Lor Textiles, Inc. v. Pacific Compress Warehouse Co.*, 547 S.W.2d 738, 743 (Tex.Civ.App. 1977, writ ref'd n.r.e.).

IV.

In summary, a bank customer ordinarily cannot prevail against the FDIC on the basis of an oral promise made by the failed bank's officer. Our precedent simply does not support Appellants' contention that because MBank failed while their suit was on appeal, government regulators cannot raise *D'Oench Duhme* defenses.

We therefore AFFIRM that portion of the district court judgment denying Appellants recovery on their underlying claims and REVERSE the district court judgment awarding Appellants recovery of attorneys' fees.[7]

AFFIRMED IN PART, REVERSED IN PART.

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[7] **Although the Texas Court of Appeals remanded a number of claims for trial, our conclusion that *D'Oench Duhme* bars Appellant's claims makes remand unnecessary.**

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2144

HARRY LEMAIRE, ET AL.,
Plaintiffs,
HILMAR R. ZEISSIG, ET AL.,
Plaintiffs-Appellants,
Cross Appellees,
versus
THE FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBank Abilene, N.A.,
Defendant-Appellee,
Cross Appellant,
and
THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Intervenor-Defendant,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(JUNE 24, 1994)

Before GOLDBERG, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES DISTRICT COURT **SOUTHERN DISTRICT OF TEXAS**

HENRY LEMAIRE, et al., §
Plaintiffs, §
§
versus § CIVIL ACTION NO.
§ H-89-1393
THE FEDERAL DEPOSIT §
INSURANCE CORPORATION §
as Receiver for MBank §
Abilene, N. S., et al., §
Defendants. §

ORDER

For purposes of federal appellate procedure, the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered April 6, 1989, is adopted by this court.

Signed on January 19, 1993, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX D

APRIL 6, 1989

JUDGMENT
THE FOURTEENTH COURT OF APPEALS

MBANK ABILENE, N.A., APPELLANT

NO. C14-86-00834-CV V.

HARRY LeMAIRE and RICHARD E. PATTON,
APPELLEE

This cause, an appeal from the judgment in favor of Harry LeMaire, Richard E. Patton, Hilmar Zeissig, Bert Scales, and Dieter Scherfenberg signed August 12, 1986, came on to be heard on the transcript of the record. We have inspected the record and find error in the judgment. We instruct the trial court to enter judgment in accordance with the following:

1. We affirm that portion of the judgment awarding damages to Patton and LeMaire (special issue four(4)). We further affirm that portion of the judgment awarding attorneys fees to all plaintiffs (special issue forty-two (42)).

2. We modify the judgment so that Scales, Zeissig, and Scherfenberg take nothing on their breach of contract claim (special issue nine (9)). We further modify the judgment so that Scales take nothing on his fraud claim (special issue fourteen (14)). We reverse the remainder of that portion of the judgment awarding damages for fraud and tortious interference. This portion of the cause is remanded

for new trial (special issues thirteen (13), fourteen (14), and sixteen (16)). We order a retrial for Zeissig and Scherfenberg on the question of limitations.

3. We modify the judgment so that Patton and LeMaire take nothing on their unconscionability claims (special issues seventeen (17) and nineteen (19)). We reverse that portion of the judgment awarding Patton and LeMaire damages for representation of a particular grade of service. This portion of the cause is remanded for new trial on the question of limitations (special issue twenty (20)).

4. We modify the judgment so that Patton and LeMaire take nothing on their claims of disparagement and confusion (special issues twenty-one (21) and twenty-two (22)). We further modify the judgment so that all plaintiffs take nothing on their claims of false representation of benefits (special issue twenty-three (23)). We further modify the judgment so that all plaintiffs take nothing on their claims of breach of warranty of a timely loan of funds (special issue twenty-four (24)).

5. We modify the judgment so that Scales, Zeissig, and Scherfenberg take nothing on their claims of breach of warranty of superior service (special issue twenty-five (25)). We reverse that portion of the judgment awarding Patton and LeMaire damages on this claim (special issue twenty-five (25)). We order a retrial for Patton and LeMaire on the question of limitations.

6. We reverse that portion of the judgment awarding all plaintiffs damages on their claim of representation of benefit conferral (special issue twenty-six (26)). This portion of the cause is remanded for new trial on the question of limitations.

7. We modify the judgment so that all plaintiffs take nothing on their claims of implied warranty (special issue twenty-seven (27)). We further modify the judgment so that all plaintiffs take nothing on their claims of failure to disclose (special issue twenty-eight (28)). We further modify the judgment so that Patton and LeMaire take nothing on their claims of mental anguish (special issue thirty-three (33)) and defamation (special issues thirty-five (35) and thirty-seven (37)).

8. We reverse the remainder of the judgment and remand the cause for further proceedings consistent with our opinion. We order MBank Abilene, N.A., and its surety, Universal Surety of America, jointly and severally, to pay one-half of all costs incurred by reason of this appeal. We order Harry LeMaire, Richard E. Patton, Hilmar Zeissig, Bert Scales, and Dieter Scherfenberg, jointly and severally, to pay one-half of all costs incurred by reason of this appeal. We order this decision certified below for observance.

Affirmed as Modified in Part, Reversed and Remanded in Part and Opinion filed April 6, 1989.

Seal

In The
Fourteenth Court of Appeals

NO. C14-86-00834-CV

MBANK ABILENE, N.A., Appellant
V.
HARRY LeMAIRE and RICHARD E. PATTON, Appellees

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 52, 567

OPINION

This is a lender liability case in which MBank Abilene brings one hundred fifty-three points of error.

Five plaintiffs sued MBank Abilene for breach of an oral promise to lend $3,000,000 to their oil and gas company. After a five week trial, the case went to the jury on theories of breach of contract, promissory estoppel, fraud, tortious interference with business relations, defamation, and violation of the Texas Deceptive Trade Practices Act (DTPA). The jury returned with a 10-1 verdict for the plaintiffs, assessing damages at over $100,000,000. In accordance with the plaintiffs' motion for judgment, the trial court rendered judgment against MBank for approximately $69,000,000. We leave intact the recovery by Patton and LeMaire for breach of contract and promissory estoppel ($9.25 million each). We reverse the judgment in most other respects. Several of these claims shall be retried, although some are barred outright.

I. THE FACTS

The following discussion presents a general chronology of events. More detailed presentations appear in the applicable sections of this opinion. Plaintiffs Richard Patton and Harry LeMaire first met Abilene National Bank's Don Earney in about 1976, at the beginning of his tenure as the bank's chief executive officer, chairman of the board, and majority stockholder. Patton and LeMaire often went to Earney when they sought financing for their oil and gas dealings. By 1981 they were doing most of their banking with Abilene National Bank (ANB).

At about this time DST, a West German enterprise, became interested in selling some of its holdings for domestic tax purposes. Patton and LeMaire sought to acquire from DST a group of three companies: Lingen Exploration, Inc. (LEX); Lingen Oil & Gas, Inc. (LOG); and Talvez Energy, Inc. Patton and LeMaire hoped to buy these companies at a low price, drill wells, and sell at a profit after developing their properties. Joining Patton and LeMaire were the three other plaintiffs, Hilmar Zeissig, Bert Scales, and Dieter Scherfenberg. [1] The five executed a shareholder's agreement among themselves and sought financing from Don Earney.

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[1] Zeissig was president of LEX and LOG. Scales served as vice-president for exploration. Scherfenberg worked for Delta Steel, a company related to DST.

Earney worked with the plaintiffs and proposed formation of a holding company, Lingen Energy Corporation (Lingen)[2] ANB supplied $3,000,000 of the necessary financing. The lion's share of the funds, however, came in the form of a $5,000,000 loan from Continental Illinois National Bank & Trust. Each plaintiff became a director of Lingen, as did Earney.

In their efforts to develop Lingen's drilling programs, the plaintiffs had to decide where to find funding. Rather than promote the sale of fractional interests in Lingen's major leasehold asset (the Lobo prospect in Zapata County), they pursued all such financing from ANB. On or about January 20, 1982, Earney made an oral commitment to extend a $3,000,000 line of credit. (Although federal regulations prohibited the bank from making such a loan commitment, Earney apparently envisioned having other banks participate, thus avoiding a violation of federal law.) The parties contemplated that repayment would come from production, unless the well(s) turned out dry, in which case payment was due in six months. Interest was to be two percent above prime.

In February of 1982 ITAG, a German entity, bought 10% of Lingen's stock for over $2,000,000. In April the plaintiffs decided to move their existing loans from Continental Illinois to ANB, since Earney wanted Lingen's business and claimed that ANB could do a better job than the Chicago bank.

By this time, however, 1982 was turning out to be an unfortunate year for the oil and gas industry in general, and for energy lenders such as ANB in particular. Lingen began to need cash for the Lobo wells, but Earney asked for some additional time to put out brush fires within ANB. On July 9 the Dallas Morning News reported that ANB was in financial extremis. This story sparked a run on the bank, and out-of-state institutions pulled out of ANB entirely.

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[2] This restructuring was intended for lending limit purposes, about which more later.

Earney maintained that the reports of ANB's troubles were exaggerated. He continued to believe he could meet the funding commitment. Federal regulators were now investigating ANB, however, and the Comptroller of the Currency issued a cease and desist order which severely curtailed the bank's ability to lend funds. Indeed, the examiners found ANB to have violated federal lending limits as to the Lingen companies. Earney was able to lend $440,000 to Patton and LeMaire via an unrelated company, but Lingen too was now on its last financial legs. ANB never could make the loan, and Lingen would ultimately fail, because it had insufficient funds to finance drilling for the minerals in place.

In August of 1982 ANB was transferred to Mercantile Texas (MCorp). Ralph Ridlinghafer replaced Earney as bank president. Just as Earney had done, Ridlinghafer refused to fund the loan. The plaintiffs sought desperately to salvage Lingen through various maneuvers. In October they found an agreeable drilling company, Trio Tubular. Trio Tubular offered to drill the wells and accept payments out of production, but Lingen first had to pay off an existing lien on the Lobo wells, and ANB had to subordinate its interest in favor of Trio Tubular. ANB declined the invitation to assist.

Patton and LeMaire filed suit against ANB (now MBank) in Taylor County on November 2, 1984. Zeissig and Scherfenberg filed a separate suit on February 28, 1985. Since Lingen had filed for bankruptcy reorganization, Scales requested and got permission to intervene on behalf of Lingen in the Patton-LeMaire action on July 22, 1985. The cases were consolidated for all purposes on August 30, 1985.

Because of local publicity,[3] MBank requested a change of venue. The litigation was moved to Fort Bend County, and trial took place there. After losing at trial, MBank sought a stay of enforcement of the judgment under 12 U.S.C. § 91, which bars collection of a money judgment from a national bank before "final judgment." The trial court denied the stay. MBank pursued mandamus relief in this court and the Texas Supreme Court, but to no avail.

The plaintiffs then instituted garnishment proceedings and caused writs to be served on several banks, including MBank Dallas, MBank Fort Worth, and the Federal Reserve Bank of Dallas. In response, the United States (on behalf of the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency) procured a temporary restraining order from the United States District Court for the Northern District of Texas, Abilene Division. That court then interpreted the "final judgment" provision of 12 U.S.C. § 91 as prohibiting collection proceedings until the National Bank exhausted its appellate remedies. Accordingly, the temporary restraining order ripened into an injunction. The Fifth Circuit affirmed, and the United States Supreme Court denied certiorari. *United States v. LeMaire*, 826 F.2d 387

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[3] Earney and James L. Kington, ANB's former vice-president, were indicted on numerous counts, including embezzlement, falsifying a loan application, filing a false income tax return, and violation of banking statutes. *See* United States v. Kington and Earney, 801 F.2d 733 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1888 (1987).

MBank's reply brief indicates that Earney was convicted on 37 counts on April 15, 1988 and sentenced to 12 years in prison. Reply Brief at 2 n. 1.

(1987), *cert. denied*, 108 S.Ct. 1223 (1988). MBank has posted no supersedeas bond. *Cf. Bank of East Texas v. Jones*, 758 S.W.2d 293 (Tex. App. -- Tyler 1988, no writ)(analogous state statute).

II. THE LAW

In order to avoid repetition, we shall state at the outset the legal principles which guide our review. Because MBank raises many challenges to the evidentiary support for the damage findings, we will spell out the procedural standards of review. And because this case may be the first to consider an oil and gas lender's liability for harm to a borrower,[4] we will discuss briefly the substantive law of banking and the development of theories of liability.

A. PROCEDURAL STANDARDS

Sufficiency of the evidence. MBank brings a plethora of legal and factual insufficiency challenges to the evidentiary support for the verdict.

Legal insufficiency means that no evidence supports the finding, i.e. that reasonable minds could not differ or that no more than a scintilla of supporting evidence exists. *See Blevco Energy, Inc. v. Getty Oil Co.*, ____S.W.2d____ (Tex. 1988); *Garza v. Alviar*, 395 S.W.2d 821 (Tex.1965); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951); *see also* Calvert, "*No Evidence*" and "*Insufficient Evidence*" *Points of Error*, 38 TEX. L. REV. 361 (1960)' Garwood, *The Question of Insufficient Evidence on Appeal*, 30 TEX. L. REV. 803 (1952).

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[4] *See* Note, Patchwork in the Oilpatch: Lender Liability for Improper Interference with the Business Affairs of an Oil and Gas Borrower, 7 REV. OF LITIGATION 71, 74, 95 (1987).

Factual insufficiency means that some evidence supports the finding, but the evidence is so weak that the finding must be set aside and a new trial ordered. *Garza v. Alviar*, 395 S.W.2d at 823. Review of the jury's findings is necessarily restricted, because wholesale transplantation of our views for the jury's would infringe on the right to trial by jury. TEX. CONST. art. V, § 10; *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 648-49 (Tex. 1988). At the same time we have the constitutional authority -- indeed the responsibility -- "to review the sufficiency of evidence in support of the fact finder's determinations for one reason: to undo the effect of an unjust trial." *Herbert v. Herbert*, 754 S.W.2d 141, 145 (Tex. 1988) (Phillips, C.J. concurring in the result). In order to fulfill that responsibility without simply substituting our views, we must detail the relevant evidence and clearly state why a particular finding is so against the great weight and preponderance as to be manifestly unjust, if we have determined that a factual sufficiency complaint is well taken. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

Waiver. In their brief, Patton and LeMaire devote considerable energy to arguing that MBank waived or otherwise lost the right to complain of errors in the charge. Al least 50 of MBank's points of error assign such complaints. The applicable requirements appear in TEX. R. CIV. P. 274, which provides in pertinent part:

> A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. When the complaining party's objection, or requested

> question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable.

The Supreme Court has enforced the rule's policy by refusing to consider an otherwise valid objection which was drowned in a sea of meritless complaints. *Monsanto Co. v. Milam*, 494 S.W.2d 534 (Tex. 1973); *McDonald v. New York Cent. Mut. Fire Ins. Co.*, 380 S.W.2d 545 (Tex. 1964); *see* 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.29 (rev. 1983). Courts of Appeals have likewise declined to permit erosion of the rule. *Smith v. Christley*, 755 S.W.2d 525 (Tex. App. -- Houston [14th Dist.] 1988, writ requested); *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 330-31 (Tex. App. -- Houston [1st Dist.] 1982, writ ref'd n.r.e.); *Clarostat Mfg. Inc. v. Alcor Aviation, Inc.*, 544 S.W.2d 788, 791 (Tex. Civ. App.-- San Antonio 1976, writ ref'd n.r.e.); *see also Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142, 145-46 (Tex. App. -- Dallas 1985, writ dism'd by agr.)(mere number alone does not violate rule 274). The same result occurs when the flood of complaints consists of requests rather than objections. *Jon-T Farms, Inc. v. Goodpasture*, 554 S.W.2d 743, 751 (Tex. Civ. App. -- Amarillo 1977, writ ref'd n.r.e.). We have applied these standards to MBank's objections to the charge. Although the question is close, we decline to penalize MBank's in this case where the charge is so long.

B. BANKING LAW.

Lending limits. National banks operate under extensive federal regulation. One of the most significant of such federal laws is the lending limit statute, 12 U.S.C. §

84. It places a ceiling on the amount a national bank may lend to any single customer.[5] The present general limit is 15 percent of the bank's capital (formerly 10 percent). The Office of the Comptroller of the Currency promulgates regulations to implement this law. The regulations figure heavily in determining whether two (or more) borrowers should be treated as one for purposes of § 84. *See* 12 C.F.R. § 32.5. Indeed the examiners in this case made just such a determination, finding that the Lingen companies should be treated as a single borrower for lending limit purposes. That determination precipitated this lawsuit.

Any director who knowingly violates or knowingly permits a violation of § 84 becomes subject to a civil money penalty and *personal* liability for resulting damages. 12 U.S.C. § 93; *See del Junco v. Conover*, 682 F.2d 1338 (9th Cir. 1982); *First Nat'l Bank of Lincolnwood v. Keller*, 318 F.Supp. 339 (N.D. Ill. 1970). Furthermore, the Comptroller has the authority to order the cessation of such a violation. 12 U.S.C. § 1818(b). In the case at bar the Comptroller issued a cease and desist order which prohibited ANB's Earney from funding the loan commitment to Lingen, because application of the attribution rules showed that Lingen was a single enterprise.

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[5] How one views the purpose of § 84 will impact on one;s view of the enforceability of an "illegal" loan commitment. If § 84 exists purely as a regulatory measure between the government and the bank, there is no reason to keep a borrower from suing on such a contract. But if lending limit functions to protect the banking system in general and the public at large, there is good reason to disallow such lawsuits.

Section 84(b)(1) defines a loan in terms of the advance of funds, including any liability to advance funds. Nevertheless, the Comptroller presently takes the position that a *commitment* to make an overline loan does not violate § 84. *See* 12 C.F.R. § 32.2(d).

Lender liability. In recent years banks have had to defend themselves against a growing number of lawsuits. Theories of liability continue to swell in scope and in number. The plaintiffs in this case secured jury findings on more than half a dozen theories, and MBank asks us to define the boundaries of each cause of action. We will therefore look briefly at the underlying legal concepts before addressing MBank's points of error.

It is common ground that tort law is moving from private risk-assumption toward socialized risk-spreading. *See* Ebke & Griffin, *Lender Liability to Debtors: Toward a Conceptual Framework*, 40 SW.L.J. 775, 800 (1986).[6] The impact on banks has drawn national attention. *See* Flick & Replansky, *Liability of Banks to their Borrowers: Pitfalls and Protections*, 103 BANKING L.J. 220 (1986); Blodgett, *Lender Liability Still Lurking*, 74 A.B.A.J. 42 (May 1988). Texas banks have not been immune from the trend,[7] although at least one commentator has advocated special treatment for petroleum lenders. Note, *Patchwork in the Oilpatch: Lender Liability for Improper Interference with the Business Affairs of an Oil and Gas Borrower*, 7 REV. OF LITIGATION 71 (1987). *CF* Dwyre, *Practical Applications and a Survey of Cases: The DTPA and Oil and Gas*, 18 TEX. TECH. L. REV. 145 (1987) (discussing cases not involving banks).

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[6] *See also id.* at 806 ("As a result, an increasingly popular view is that compensation of debtors is the central purpose of the law.")

[7] *See* Tyler, Emerging Theories of Lender Liability in Texas, 24 HOUS. L. REV. 411 (1987).

A few causes of action come from federal statutes, such as the securities acts [8], environmental protection laws[9] or the Racketeer Influenced and Corrupt Organizations (RICO) Act[10]. The Texas DTPA has also formed the basis of some suits, [11] as it did--in part--in this case. The mass of litigation against lenders, however, has been based on common law theories.

Simplest among the common law theories is breach of contract, especially breach of an oral contract. Closely related is the tort of fraud. These two causes of action lie at the heart of the suit against MBank. Several reported decisions exhibit a tendency toward reformulating fraud and breach of contract into so-called emerging theories such as "control,"[12] "bad faith,"[13] and "prima facie tort."[14] The consensus of commentators, however, maintains that the apparent recasting is for the most part illusory, and that little legal novelty can be found in the new models of liability. [15]

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[8] *E.g.* Securities Act of 1933, § 15, 15 U.S.C. § 77o (1982); Securities Exchange Act of 1934, § 20(a), 15 U.S.C. § 78t(a) (1982). *See* Metge v. Bachler, 762 F.2d 621 (8th Cir. 1985); Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793 (3rd Cir. 1978; Flick & Replansky, 103 BANKING L.J. 220-32 (1986).

[9] *E.g.* Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1982). *See* Flick & Replansky, 103 BANKING L.J. 220, 248-51 (1986).

[10] 18 U.S.C. §§ 1961-1968 (1982). *E.g.* Morosani v. First Nat'l Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983). *See* Flick & Replansky, 103 BANKING L.J. 220, 224-25 (1986).

[11] TEX. BUS. & COMM. CODE § 17.41-17.63 (1987). *See* Tyler, 24 HOUS L. REV. 411, 438-43 (1987).

[12] *See* Flick & Replansky, 103 BANKING L.J. 220, 239-42 (1986); Tyler, 24 HOUS. L. REV. 411, 431-38 (1987); Ebke & Griffin, 40 SW.L.J. 775, 791-95 (1986).

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[13] *See, e.g.* Noonan v. First Bank Butte, 740 P.2d 631 (Mont. 1987) (breach of the covenant of good faith under the Uniform Commercial Code defined ass arbitrary, capricious, or unreasonable action and not merely absence of honesty-in-fact); Centerre Bank of Kansas City v. Distributors, 705 S.W.2d 42 (Mo. App., 1985) (rejecting such a duty); K.M.C. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985)(finding such a duty); Commercial Cotton Co. v. United California Bank, 163 Cal. App. 3d 511, 209 Cal Rptr. 551 (1985) (finding such a duty); Sterling Faucet Co. v. First municipal Leasing Corp., 716 F.2d 543 (8th Cir. 1983) (finding such a duty).

In eschewing departure from traditional causes of action, the leading discussion on the Texas experience "applauds the refusal of Texas courts to abandon these time-tested theories for a broadly implied but poorly defined duty of 'good faith.'" Tyler, 24 HOUS. L. REV. 411, 413 (1987). *See* English v. Fischer, 660 S.W.2d 521 (Tex. 1983). Professor Tyler concludes that "The divergent Texas cases regarding the implied duty of good faith are probably best reconciled by an analysis that implied duty in Texas will be applied in interpreting contracts, but not to contradict the express terms of a contract." 24 HOUS. L. REV. at 423.

[14] This tort theory is partially articulated in RESTATEMENT (SECOND) OF TORTS § 870 (1977). It amounts in essence to a duty not to commit a tort, and it has drawn scathing criticism. *See, e.g.*Dobbs, Tortious Interference with "Contractual Relations, 34 ARK. L. REV. 335, 345 (1980); Ebke & Griffin, 40 SW.L.J. 775, 798-800 (1986); Granoff, Emerging Theories of Lender Liability: Flawed Applications of Old Concepts, 104 BANKING L.J. 492, 499-501 (1987).

[15] *See* Flick & Replansky, 103 BANKING L.J. 220, 257 (1986)("the various theories of liability outlined in this article are, for the most part, not new or novel theories of law."); Granoff, 103 BANKING L.J..492, 493 (1987) ("Although it has become fashionable to refer to 'emerging theories' of lender liability, it is the opinion of this commentator that established legal concepts, both in contract and in tort remain essentially unchanged."); Tyler, 24 HOUS. L. REV. 411, 448 (1987) ("Texas courts have been effective in their use of traditional tort

For an example of the application of traditional theories in the context of a debtor-creditor relationship, see *State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc.*, 678 S.W.2d 661 (Tex. App. -- El Paso 1984, writ dism'd by agr.).

III. CONTRACT

A. MATERIAL TERMS

The first two points of error argue that the agreement lacks sufficient certainty and definiteness of terms. In special issues 1 and 6 the jury found MBank breached an agreement with the plaintiffs. Because the overwhelming weight of the evidence indicates there was am agreement on some terms, our task is to determine whether those terms provide a basis for relief.

The starting point for our analysis is Supreme Court precedent. Texas law prefer to validate transactions rather than void them, but courts may not as a rule interpolate or eliminate material terms. *Dahlberg v. Holden*, 150 Tex. 179, 238 S.W.2d 699 (1951). A court will not create a contract where the parties have not made one. At the same time, parties may agree on some terms sufficient to support a contract, leaving others for a later day; failure to reach agreement on a second set of provisions will not vitiate the existing terms *Scott v. Ingle Bros. Pacific, Inc.*, 489 S.W.2d 554 (Tex. 1972); *Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612 (Tex. App. -- Houston [14th Dist.] 1984, no writ). Under certain circumstances, a court may even uphold an agreement by supplying a missing term. *See Bendalin v. Delgado*, 406 S.W.2d 897 (Tex. 1966)(implying a reasonable price in a contract to purchase stock). These validation mechanisms have their limits, however, as a court cannot simply make up certain types of provisions such as the

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theories ... to redress a lack of good faith by lenders.").

details of interest payments on a debt. *Bryant v. Clark*, 163 Tex. 596, 358 S.W.2d 614 (1962).

The supreme court relied on *Bryant v. Clark* in *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965) and found a commercial construction loan agreement indefinite. The written contract provided for a $70,000 loan, payable in fifteen monthly installments at not more than 6% interest. The court held that the contract was not sufficiently definite to support an ordinary action for breach, but that the plaintiff had stated a viable cause of action on the theory of promissory estoppel.

Thus, an agreement can be sufficiently definite for one remedy, but not for another. Typically the cases say that less certainty is needed in a suit for damages than for specific performance. *See, e.g., Kirkwood & Morgan, Inc. v. Roach*, 360 S.W.2d 173, 176 (Tex. Civ. App.-- San Antonio 1962, writ ref'd n.r.e.); *Grimsley v. Life Ins. Co. of Virginia*, 154 S.W.2d 196, 199 (Tex. Civ. App.-- Austin 1941, writ ref'd w.o.m.); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 33 comment b (1981). *But cf. Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966) ("the doctrine clearly is not a rule of universal application.") MBank maintains that Don Earney contemplated drawing up a complicated set of papers, including a deed of trust, a promissory note, and documents for production payments. We consider these arguments good reason for denying specific performance, but this case is the kind of damage suit which warrants the less demanding scrutiny.

The Fifth Circuit has followed *Bryant v. Clark* and refused to enforce a $4.7 million loan commitment which set interest at "4 1/4% over Hartford National Bank prime rate with a minimum of 9%." *Willowood Condo. Ass'n, Inc. v. HNC Realty Co.*, 531 F.2d 1249 (5th Cir. 1976); *see also*

Neeley v. Bankers Trust Co. of Texas, 757 F.2d 621 (5th Cir. 1985). In the case at bar, virtually all witnesses testified to adoption of an interest formula of "2% over prime," in accordance with their customary practice.

Texas courts of appeals have had occasion to address the question of indefiniteness, often finding no more than an agreement to agree. *See Pine v. Gibraltar Savings Ass'n*, 519 S.W.2d 239 (Tex. Civ. App.--Houston [1st Dist.] 1975, writ ref'd n.r.e.); *Hankins v. First Nat'l Bank of Panhandle*, 287 S.W.2d 493 (Tex. Civ. App. -- Amarillo 1956, writ ref'd n.r.e.). Such bargains are uniformly regarded as unenforceable. E. FARNSWORTH, CONTRACTS § 3.29 (1982); J. CALAMARI & J. PERILLO, CONTRACTS § 2-13, at 51 (2d ed. 1977). It is possible, however, to obviate uncertainty by looking to the antecedent details of the transaction for gap-filling.

Morgan v. Young, 203 S.W.2d 837 (Tex. Civ. App. -- Beaumont 1947, writ ref'd n.r.e.) awarded damages on a contract to lend money for growing a rice crop. There was a history of prior dealings between the parties, involving the repeated lending of funds for the purpose of cultivating rice. The court found sufficient definiteness as to acreage and loan size by relying on the established course of dealing.

In our case the plaintiffs had developed a close relationship with MBank's Don Earney over many years. The loan commitment was not made in a vacuum, but against a rich background of virtually identical loans. Although *Bryant* and *Willowood* clearly establish the unenforceability of this contract as an original matter, we find sufficient definiteness to support a damage award in view of the extensive and repetitious course of dealing between the parties. Despite obvious differences between rice and oil, this financing arrangement is closer to the rice farmer's requirements contract in *Morgan* than to the contracts in *Bryant* or *Willowood*.

The scope of this holding is narrow and should not be misconstrued. Our finding of enforceability is not based on any juridically special character of the relationship (such as confidential or fiduciary status). Nor do we hold that any prior dealings at all can supply omitted material terms. We simply take actors at their word when their long established practice fixes the significance of ordering "the usual." The first two points of error are overruled.

B. ILLEGALITY

The third point of error attacks the contract as violating 12 U.S.C.§ 84, the lending limit statute.[16] MBank asserts that such an agreement is illegal and therefore unenforceable. MBank cites a variety of cases in support of this position, as do the plaintiffs. We recognize the split of authority and the lack of decisions squarely on point by the United States Supreme Court or the Texas Supreme Court.

The United States Supreme Court has held that such a contract is valid as to the borrower when the bank sues for collection. *Union Gold Mining Co. of Colorado v. Rocky Mt. Nat'l Bank*, 96 U.S. 640 (1878). The Court reasoned that disallowing recovery of amounts in excess of federal

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[16] The issuance of a cease and desist order in this case reinforced the lending limit statute, but does not change our analysis. That order cannot constitute the kind of supervening impracticability which would justify non-performance, because it merely echoes the statute. Violation of the statute was certainly MBank's fault, within the meaning of RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 264 (1981). MBank knew of the lending limits as well as the attribution rules for loans to separate entities.

lending limits would injure those who have an interest in the safety of the bank. Unfortunately the Court has given no further guidance, and the task of deciding the liability of a *bank* has devolved upon lower federal and state courts.

Texas Supreme Court precedent is equally sketchy. The only indication we can find occurs in dictum in *Goldstein v. Union Nat'l bank*, 109 Tex. 555, 563, 213 S.W. 584, 588 (1991). There the court cited *Union Gold* for the general proposition that an overline loan is purely a matter between the bank and the government. Texas courts of appeals have twice faced the issue directly and twice refused to enforce the illegal contract in favor of the borrower. *First Texas Savings Ass'n v. Dicker Center, Inc.*, 631 S.W.2d 179 (Tex. App. -- Tyler 1982, no writ)(involving a savings and loan regulation); *Grammer v. City Nat'l Bank of Cleburne*, 262 S.W.2d 106 (Tex. Civ. App. -- Waco 1953, writ ref'd n.r.e.). The out of state decisions fall on both sides of the issue but usually find that the illegal part of the contract is either fully enforceable or wholly unenforceable, with no middle ground. *See, e.g. National Farmers Org. v. Kinsley Bank*, 731 F.2d 1464 (10th Cir. 1984) (enforceable); *Jaynes v. First Nat'l Bank*, 236 F.2d 258 (9th Cir. 1956) (unenforceable).

More central to our inquiry is the extent to which public policy bars enforcement of the agreement. The second restatement provides a useful framework:

> § 178. When a Term Is Unenforceable on Grounds of Public Policy
>
> **(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly**

outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of

(a) the parties' justified expectations,

(b) any forfeiture that would result if enforcement were denied, and

(c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

(a) the strength of that policy as manifested by legislation or judicial decisions,

(b) the likelihood that a refusal to enforce the term will further that policy.

(c) the seriousness of any misconduct involved and the extent to which it was deliberate, an

(d) the directness of the connection between that misconduct and the term.

Militating in favor of enforcing the contract are the expectations of the plaintiffs. The testimony established beyond cavil that they checked and rechecked with Earney on the viability of their line of credit. He continued to reassure them, notwithstanding the bank's approaching doom. Furthermore, the plaintiffs lost their businesses in the wake of MBank's failure to fund. That failure to fund left the plaintiffs with nowhere to turn, because Earney had convinced them to sever their connections with other banks and move all of their business to ANB. By the time ANB refused to follow through, it was impossible to secure funding from alternate sources.

Weighing against enforcement is the policy of protecting the national banking system from unsafe loans. There is serious question as to whether the plaintiffs knew full well that the structure of their various corporations was set up as a sham, solely to avoid federal law. There is also reason to doubt that they had no idea what Earney meant when he said he was under a "12 U.S.C.," although one plaintiff testified he "thought maybe it was a score against UCLA." The same extensive course of dealing which helps make this agreement sufficiently definite also enhances the testimony's indications that the borrowers knew they were evading federal law. What is more, the damages for breach of contract in this case exceed the magnitude of the loan by more than a factor of fifteen, a disparity so serious that we would prefer not to regard recognition of the illegality as completely between the bank and government. However, we can find no authority for holding that federal law preempts us from approving damages in the amount of fifteen times the lending limit. Point of error three is therefore overruled.

C. STATUTE OF FRAUDS

Point of error four states that the contract falls within the statute of frauds, TEX. BUS. & COMM. CODE § 26.01. MBank presents two rationales for this conclusion:

(1) the contract involved an interest in land, and

(2) the contract could not have been performed within one year.

We agree with the first conclusion and find it unnecessary to reach the second.

The manifest intention of the parties was to use the oil and gas properties as collateral for the loan. Some testimony indicated the contemplation of production payment, whereas other testimony implicated the wells as such. The difference is immaterial. An interest in production is realty for the purpose of the statute of frauds. *Clyde v. Hamilton*, 414 S.W.2d 434 (Tex. 1967). Accordingly, the statute applies to a contract calling for creation of a lien on such *Woodman v. Bishop*, 203 S.W.2d 977 (Tex. Civ. App. -- San Antonio 1947, no writ); *Twenty-One Turtle Creek Square, Ltd. v. New York State Teachers' Retirement Sys.*, 425 F.2d 1366 (5th Cir. 1970). That the details of the abortive documentation remain unclear only illustrates the utility of having a statute of frauds in the first place.

In their brief, Patton and LeMaire concede applicability of the statute, bolstering our conclusion. Furthermore, the Supreme Court early rejected the notion of a restrictive reading of the law. *Sprague v. Haines*, 68 Tex. 215, 4 S.W. 371 (1887)(the statute covers every patrol contract, in whatever shape it may be put, by which either party is to part with real estate), *overruling Anderson v. Powers*, 59 Tex. 213 (1883). This rule still apples. *See Edward Scharf Assoc., Inc. v. Skiba*, 538 S.W.2d 501 (Tex. Civ. App. -- Waco 1976, no writ).

It is unnecessary to answer the more difficult question regarding the one year provision. [17] Point of error four is sustained.

D. MISCELLANEOUS

The fifth point of error claims there was no consideration. Don Earney, however, bargained for the plaintiffs to abstain from going to outside interests to promote the Lingen drilling program. He also persuaded them to move all their banking business from Continental Illinois to ANB. They complied to their detriment. We overrule point of error five.

In the sixth and seventh points of error MBank contends that since conditions precedent to the contract were left unsatisfied, ANB never became obligated to perform. MBank relies chiefly on Don Earney's testimony. He gave somewhat inconsistent testimony in that he insisted he had made the commitment yet he understood several events to lie ahead. Those events included an ongoing evaluation of Lingen's financial health, the status of the petroleum industry, and the preparation of certain documents. The plaintiffs consistently denied the existence of any conditions precedent.

MBank objected to the omission of issues inquiring about conditions. MBank also requested such issues, but the court submitted none. The proper standard of review requires us to determine whether any evidence raised the issue. A trial court may refuse to submit an issue only when no evidence supports the issue. In examining the record, we must indulge all inferences in favor of the party asserting the existence of evidence. We have set out pertinent portions of Earney's testimony.

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[17] Patton and LeMaire originally conceded the applicability of this provision, but their amended brief takes the contrary position. In both briefs they argue for avoidance of the statute on secondary grounds, however, such as promissory estoppel. We will address promissory estoppel considerations in due course.

> Q. I think you testified earlier that you didn't really foresee any problem, had plenty of demand for loan participations to other banks at this point in time?
>
> A. Yes, I did, sir.
>
> * * * * *
>
> Q. (By Mr. Joyce) And as of that point in time, there had been some problems that had been discovered in the oil and gas business, had there not? Business had turned around.
>
> A. Yes. As it has now.
>
> Q. And in order to loan the money at that time, you would have to justify extending credit based upon the circumstances in the oil and gas business at that time, wouldn't you?
>
> A. Well, you know, under those circumstances, I would feel as if we were talking about a totally separate loan. A judgment call would have to be made at that point in time. The point in time that I made the decision in January, that was based on what was to occur in the coming months, you know, like at that point this time.

Obviously, if they didn't drill those leases, if we could assume that never happened, and they were, in a year or two later, you know, we would have to sit down and work out a total different deal.

Q. I guess the point is, if all of the parties understood that, you would have to see where Lingen was at, where the oil and gas business was at, here gas curtailment or prices at the time the money was requested.

MR. CLAYCOMBE: I object to that. Cumulative. And also asks what -- I think this witness can testify to what he understood, but Mr. Patton and Mr. LeMaire will speak for themselves as far as what they understood.

THE COURT: I'll sustain the objection.

Q. (By Mr. Joyce) Mr. Earney, just what you understood. Did you understand that when the money was requested from Mr. Patton and Mr. LeMaire on behalf of Lingen, you'd have to evaluate the credit at that point in time in order to determine whether to go forward?

A. No, sir. That's what we did in January. I agreed to make the loan in January. I was satisfied with the circumstances and felt like it had -- at some point in the near future, that I would be asked to start advancing that money. I didn't think it would occur in a few days, because I knew the process that you must go through to sign an AFE [authorization for expenditure] with your partner, and drilling rigs be located, well commenced. And the majors such as

Conoco, sometimes takes months, weeks to build it. So I knew that it would be sometime in the future before they would actually need the money. But I was going -

Q. Let me ask you about that. As time was going by, did you know in your mind when you were talking to Mr. Patton and Mr. LeMaire, as time went by, you would have to re-evaluate at some point in the future?

MR. CLAYCOMBE: Well, I'm going to object to this unless it has something to do with what the witness said to Mr. Patton and Mr. LeMaire. As far as the agreement.

Q. (By Mr. Joyce) Your understanding of the agreement, Mr. Earney.

A. Simply by the nature of the way we operated. We evaluated the loans all the time and everything, customers. You know, we watched them. One of reasons we're sitting on the board -- whether we were on the board or not, we watched the performance, watched the market place, watched what was happening, looked at their credit file. Everybody had credit files and had an ongoing evaluation of every credit customer that we had. I would say it was somewhat daily that you tried to keep abreast to be in a position to know what kind of shape you were in on any particular credit. So we were evaluating that credit line constantly but not in the sense of whether or not we would loan this $3,000,000.00, and I agreed to do that.

* * * * *

Q. Now, Mr. Claycombe asked you about what might be foreseeable if the bank didn't loan this money. As of January of 1982, I assume you viewed this as a good credit and foresaw no problem with funding or finding a participating bank?

A. That is correct.

Q. And I would assume that that also meant that if Lingen wanted to go somewhere else to borrow the money, that they had the ability to do that.

A. Yes, sir.

Q. Did you have any reason to believe in January of 1982, that if the bank could not or did not loan the money for the drilling of these wells we talked about, that the stockholders would lose all value that they had in their stock?

A. No, sir. I think in January of 1982, they could have got the money anyplace they wanted to get it. They could have sold leases or they could have done a number of things. They could have borrowed money elsewhere.

Q. Really foresaw no problem at that point in time in finding the money at some other location?

A. No. I didn't consider them using that option, you know. I was committed to make the loan, but I would say that they wouldn't have had trouble getting the money anywhere.

* *

The witness emphatically stated that he had committed to make the loan. The testimony of the plaintiffs was even stronger. Points of error six and seven are overruled.

The eighth point of error maintains that damages should not be available for breach of the loan agreement since it was a demand obligation. In other words, the lender could have called for payment at any time. MBank cites *Kelly v. Fahrney*, 97 F.176 (8th Cir. 1899). The only Texas authority we can find is *Davis v. Small Bus. Inc. Co. of Houston*, 535 S.W.2d 740 (Tex. Civ. App. -- Texarkana 1976, writ ref'd n.r.e.), which holds to the contrary. Out os state cases are scarce and of little help. *See* Annot., 4 A.L.R. 4th 682 § 4 (1981).

We are inclined to recognize the cause of action while tailoring the available remedy to fit the situation. The Supreme Court has endorsed this approach. See Mead v. Johnson Group, Inc., 615 S.W.2d 685 (Tex. 1981). That view is inspired by *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854) and appears in RESTATEMENT (SECOND) § 351. Comment e lends support to our conclusion:

> e. *Breach of contract to lend money.* The limitation of foreseeability is often applied in actions for damages for breach of contracts to lend money. Because credit is so widely available, a lender often has no reason to foresee at the time the contract is made that the borrower will be unable to make substitute arrangements in the event of breach. See Comment *d*. In most cases, then, the lender's liability will be limited to the relatively small additional amount that it would ordinarily cost

> to get a similar loan from another lender. However, in the less common situation in which the lender has reason to foresee that the borrower will be unable to borrow elsewhere or will be delayed in borrowing elsewhere, the lender may be liable for much heavier damages based on the borrower's inability to take advantage of a specific opportunity (see Illustration 14), his having to postpone or abandon a profitable project (see Illustration 15), or his forfeiture of security for failure to make prompt payment (See Illustration 16).

See also E. FRANSWORTH, CONTRACTS § 12.14 (1982). Texas courts have reached the question of where to draw the line on recoverability of lost profits. *E.g. Collin County Sav. & Loan v. Miller Lumber*, 653 S.W.2d 114 (Tex. App. -- Dallas 1983, no writ). We recognize the cause of action and take up the problem of damages later. The eighth point of error is overruled.

The ninth and tenth points of error find fault with special issues 1 and 6. MBank sought to make the jury charge more specific in identifying who was getting the loan commitment, arguing that "[w]ithout an identifiable borrower, the plaintiffs have no case since proof that ANB committed to lend funds to *somebody* is not enough." Appellant's Brief at 91.

We have examined the charge as given and appellant's complaints about it. We find any error in the charge harmless. The fuzziness of identity that existed with respect to Lingen, LEX, LOG, and the individual plaintiffs precipitated the cease and desist order which led directly to this litigation. No jury charge could have escaped the inherent confusion. Besides perfection in the field of special issues has long been recognized as unattainable. *See* 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.37.1 (rev. 1983). The Supreme Court has increased the trial court's discretion in submitting issues broadly. *E.g. Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984). Further, MBank's requested issues were essentially "various phases or different shades of the same question." TEX. R. CIV. P. 278. The ninth and tenth points of error are overruled.[18]

The eleventh point of error challenges Earney's authority. The twelfth point of error relies on a written release as a bar to suit. We take up these matters in later portions of this opinion.

IV. DAMAGES FOR DECREASE IN VALUE OF STOCK

A. STANDING

In the thirteenth point of error, MBank says the proper plaintiff was Lingen rather than its individual shareholders. MBank complains that the judgment improperly awarded those shareholders damages for decrease in stock value.

Black letter corporations law forbids individual shareholders from suing for wrongs done to the corporation. *See* 12B Fletcher Cyclopedia Corporations § 5907 *et seq* (1984). The leading Texas case is *Commonwealth of Massachusetts v. Davis*, 140 Tex. 398, 168 S.W.2d 216 (1942), in which Chief Justice Alexander expressed the rule as follows:

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[18] Appellant's brief makes additional arguments under these points, namely that the court should have instructed on conditions precedent and on "material" terms. We have considered these arguments under points of error 1,2,6, and 7.

Ordinarily, the cause of action for injury to the property of a corporation, or the impairment of destruction of its business, is vested in the corporation, as distinguished from its stockholders, even though it may result indirectly in loss of earnings to the stockholders. Generally, the individual stockholders have no separate and independent right of action for injuries suffered by the corporation which merely result in the depreciation of the value of their stock. This rule is based on the principle that where such an injury occurs each shareholder suffers relatively in proportion to the number os shares he owns, and each will be made whole if the corporation obtains restitution or compensation from the wrongdoer. Such action must be brought by the corporation, not alone to avoid a multiplicity of suits by the various stockholders and to bar a subsequent suit by the corporation, but in order that the damages so recovered may be available for the payment of the corporation's creditors, and for proportional distribution to the stockholders as dividends, or for such other purposes as the directors may lawfully determine.

There are authorities which recognize an exception to the above rule, where the wrongdoer violates a duty arising from contract or otherwise, and owing directly by him to the stockholder. The exception has been applied more often in cases where there was a fiduciary relationship which required the wrongdoer to protect the interest of the

> stockholder, and this duty was violated, and full relief to the stockholder could not be had through a recovery by the corporation.

140 Tex. at 407-08, 168 S.W.2d at 221-22 (citations omitted).

Recognizing the general rule as common ground, the parties disagree only on the applicability of its exception. The plaintiffs seize upon language in *Stennett v. Paramount-Famous Lasky Corp.*, 37 S.W.2d 145 (Tex. Comm'n App. 1931, holding approved) to the effect that justice may demand relaxation of the black letter rule. Although they do not put it in these terms, the plaintiffs essentially seek recognition as next of kin to their now bankrupt corporation. Appellant insists on application of the general rule, noting that neither a sole shareholder, majority shareholder, nor any collection of shareholders may bring suit to redress a corporate wrong. *E.g. McDonald v. Bennett*, 674 F.2d 1080 (5th Cir. 1982). Where an individual has no cause of action, he may not even join with the corporation as a plaintiff. *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893 (5th Cir. 1968).

Disability from suing as a shareholder does not necessarily prevent suit in another capacity. *See Empire Life Ins. co. of Am. v. Valdak Corp.*, 468 F.2d 330, 335 (5th Cir. 1972); *Buschmann v. Professional Men's Ass'n*, 405 F.2d 659 (7th Cir. 1969). Thus a shareholder may bring a contract action where he is actually a party to the agreement. *See* 12B Fletcher Cyclopedia Corporations § 5916 (1984); *United States v. Palmer*, 578 F.2d 144, 146 (5th Cir. 1978)(denying standing because the shareholders were not parties to the contract). Deciding whether these plaintiffs were parties to the loan commitment would be simpler if a written instrument existed, but the jury findings and the evidence support individual standing. Patton and LeMaire were, after all, to be personal guarantors for the loan. We will reach the issue of their co-plaintiffs' standing below. We overrule the thirteenth point of error.

Point of error fourteen raises a res judicata complaint. Scales took an assignment from Lingen regarding a cause of action on an escrow agreement. He then intervened in the suit by Patton and LeMaire. MBank asserts that Lingen was thus a party to the litigation, the only proper party. Having failed to bring any other claims, Lingen is, in MBank's view, forever barred from so doing. We need not address this complaint, for reasons that follow.

B. THIRD PARTY BENEFICIARIES

The fifteenth, sixteenth and seventeenth points of error relate to third party beneficiary standing. In special issue 7, the jury found that ANB intended to benefit each of the five plaintiffs. MBank disagrees and challenges the evidentiary support for the finding. It also criticizes the fashion in which the court presented the question to the jury.

American jurisdictions have reached varying results in fashioning standing rules for third party beneficiary actions. *See, e.g., Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 713 P.2d 1197 (Alaska 1986) *overruling Norman v. Nichiro Gyogyo Kaisha, Ltd.*, 645 P.2d 191 (Alaska 1982); *Hufsmith v. Weaver*, 285 Ark. 357, 687 S.W.2d 130 (1985); *Khabbaz v. Swartz*, 319 N.W.2d 279 (Iowa 1982); *Clark v. American Std., Inc.*, 583 P.2d 618 (Utah 1978); Annot., 30 A.L.R. 4th 474 (1984). Under Texas law contracts must be regarded as being made for the parties and not for strangers unless a contrary intent is clearly apparent. *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503-04 (Tex. 1975); *Texas Bank & Trust Co. v. Lone Star Life Ins. Co.*, 565 S.W.2d

353 (Tex. Civ. App. -- Tyler 1978, no writ). Some caselaw describes this rule of construction as a presumption. *E.g. Knox v. Ball*, 144 Tex. 402, 191 S.W.2d 17 (1945). Whatever the description, this principle did not appear in the jury charge. MBank assigns error to the court's refusal to give an appropriate instruction, and we agree.[19]

Applying the pertinent standard of review for assessing harm, however, we regard the error as harmless. TEX. R. APP. P 81(b)(1). Had this case involved only one inquiry of the jury, matters might be different. In light of the voluminous record and long charge, it is asking too much to request reversal for want of this instruction.

MBank also challenges the sufficiency of the evidence to support the answer to special issue 7. We find sufficient evidence to uphold the answer. Points of error fifteen through seventeen are overruled. Because we find standing for each of the shareholders, there is no occasion to decide the res judicata issue regarding Lingen.

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[19] Even given today's broad from submission practice, under which "questions of law" may be put to the jury, the court must include necessary instructions. TEX. R. CIV. P. 277. Indeed, broader questions *increase* the need for instructions. For that reason we would be mistaken in treating the disinclination to find third party beneficiaries as merely an appellate review device rather than a proper matter for the charge. *Cf. LaPoint v. State*, 750 S.W.2d 180 (Tex. Crim. App. 1988) (error to instruct the jury that burglarious intent may be inferred from nighttime entry, although appellate courts will so view the evidence).

And although a trial court may refuse to give an instruction which comments on the weight of the evidence, *see Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20 (Tex. 1987), this instruction is plainly not such. Juries simply perform certain tasks which judges once would have done. Those juries must have the benefit of the relevant legal principles which formerly guided judges.

C. DAMAGES

Point of error eighteen challenges the jury's findings regarding the amount of decrease in value of the plaintiffs stock shares. MBank asks us to find the evidence insufficient, no small feat in view of the trial record. All five plaintiffs testified at length. Don Earney (the ex-banker facing federal charges) could have helped MBank's case more but instead agreed with the plaintiffs in many respects. There was also expert testimony on the question of damages. We have examined the record and find sufficient support for the jury's answers. Point of error eighteen is overruled.

Next MBank complains of the failure to include a limiting instruction with special issue 4(A). The requested instruction would have had the jury focus on stock value before and after the occurrence. Special issue 4(A) adequately puts the question to the jury. It was not error to refuse the request, certainly not harmful error. *See* TEX. R. APP. P. 81(b). We overrule point of error nineteen.

The next two points are variations on the eighteenth point of error, attacking the damage findings in special issues 4(A), 13(A), and 30. Again, we have read the record and the arguments but perceive no basis for overturning the verdict. We overrule points of error 20 and 21.

MBank's 23rd and 24th points allege error in special issue 3 as failing to limit the jury's consideration to appropriate damages. This complaint is similar to the nineteenth point of error. The trial court did not err, and certainly committed no harmful error. *See* TEX. R. APP. P. 81(b). We overrule points of error 23 and 24.

Point of error 25 relates to the combination of different theories in certain special issues. It is overruled because MBank failed to object on these grounds. TEX. R. CIV. P. 274.

The 26th point of error says the matrix format of special issue 30 was unduly confusing. We expressly disagree. In *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984) the supreme court suggested the use of a matrix format. Special issue 30 is a natural outgrowth of the *Lemos* approach. We overrule point of error 26.

V. PROMISSORY ESTOPPEL

MBank's 27th through 38th points of error relate to promissory estoppel. If MBank's statute of fraud defense had failed, we would not need to reach this subject, because recovery would be on the contract. *Stewart & Stevenson Serv., Inc. v. Enserve, Inc.*, 719 S.W.2d 337, 344 (Tex. App. -- Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Guaranty Bank v. Lone Star Life Ins. Co.*, 568 S.W.2d 431, 434 (Tex. Civ. App. -- Dallas 1978, writ ref'd n.r.e.); *see Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1966). For the reasons given below, we uphold recovery on promissory estoppel.

MBank first attacks special issue 2 for failing to require that any reliance be *justified*. *See First State Bank in Archer City v. Shwarz Co.*, 687 S.W.2d 453 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.); *see also Fertz Const. Co. v. Southern Nat'l Bank* 626 S.W.2d 478, 483 (Tex. 1981) (adopting § 90 of the second restatement in promissory estoppel cases). We agree that reliance must be justified, or as it is sometimes phrased, reasonable. But we are convinced that no actual harm occurred for want of this instruction. TEX. R. APP. 81(b). In fact, there is every indication from the record that the reliance was justified.

Patton and LeMaire had known Earney for years and dealt with him repeatedly. Points of error 27 through 29 are overruled.

Next, appellant contends the parties failed to agree on the necessary material terms. We have already rejected this contention and overrule points of error 30 through 32.

In the 33rd and 34th points of error MBank says the charge failed to identify the party who was to receive the funds, i.e. Patton and LeMaire or a corporate entity. Special issue 2 expressly asked about a promise to Patton and LeMaire for financing Lingen, however. We think the charge adequately covered the matter. The 33rd and 34th points of error are overruled.

MBank also asks that we apply the two year statute of limitations because promissory estoppel is like fraud, which is a tort. *See* TEX. CIV. PRAC. & REM. CODE § 16.003. In our view the promissory estoppel element of this case derives from the action on the contract. As such, promissory estoppel cannot be separated from its foundation, which is breach of contract. *See Wheeler v. White*, 398 S.W.2d 93 (Tex. 1966). Point of error 35 is overruled. The next three points of error will be considered in other sections of this opinion.

VI. FRAUD

The plaintiffs secured jury findings of fraud in special issue 10. In special issue 49 the jury made findings generally unfavorable to MBank's statute of limitations defense. MBank now complains of those answers and the judgment resulting from them.

The 39th point of error asserts that the two year statute bars Scales' fraud claim. TEX. CIV. PRAC. & REM. CODE § 16.003. MBank and Scales agree that current caselaw uniformly applies the two year statute to fraud actions. *Mooney v. Harlin*, 622 S.W.2d 83, 84 (Tex. 1981); *Johnston v. Barnes*, 717 S.W.2d 1264, 165 (Tex. App. -- Houston [14th Dist.] 1986, no writ). Scales nevertheless maintains this treatment is unsound in view of prior precedent. His interesting historical argument rests on a line of cases beginning before the turn of the century. In essence he argues that since fraud was originally a subset of debt, we should return to our roots and treat it as debt -- which is now under the four year statute.

Fraud was in fact once considered debt-like for limitation purposes. *Gordon v. Rhodes & Daniel*, 102 Tex. 300, 116 S.W. 40 (1909); *Bass v. James*, 83 Tex. 110, 18 S.W. 336 (1892). At that time a two year statute governed "actions for debt." TEX. REV. CIV. STAT. art. 3354 (1895). A four year catchall provision applied to causes of action not otherwise mentioned. TEX. REV. CIV. STAT. art. 3207 (1879); TEX. REV. CIV. STAT. art. 3358 (1895). The 1979 amendment to the two year law deleted references to debt. TEX. REV. CIV. STAT. ANN. art 5526 (Vernon 1958), *amended by* 1979 Tex. Gen. & Spec. Laws 1769, ch. 716, §2. Scales reasons that whatever suits historically came within the purview of debt actions must now lie within the ambit of the four year enactment. By this reasoning modern courts are perpetuating an error, an error which Scales traces to *Quinn v. Press*, 135 Tex. 60, 140 S.W.2d 438 (1940).

Our reading of the nineteenth century opinions leads to a different conclusion. Texas jurisprudence had to reckon with problems of English common law practice, such as the law-equity distinction, and the procedural heirs of the forms of action. *See Smith v. Fly*, 24 Tex. 345, 351-52 (1859).

The notion of the debt received an expansive interpretation, at least as early as *Robinson v. Varnell*, 16 Tex. 382 (1856). This broad view of debt served as support for the line of cases cited by Scales. The common thread in those cases seems to be more an inclination to favor limitations, and less a neutral principle defining debt as including fraud. We are at a loss to explain the shift to *Quinn v. Press* and its progeny, but precedential force requires only that we follow -- and not explain -- the rule.

For even if we accepted Scales' contention that the courts jumped abruptly to the wrong conclusion for no apparent reason, stare decisis concerns still counsel against an avulsion to prior views. The two year statute corresponds well to many existing tort theories, as does the four year statute to contract. *See* §§ 16.004, 16.051. This distinction is a workable one, upon which practitioners rely, and we decline to upset it. *See Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The two year statute applies to fraud actions.

Scales counters by insisting his fraud allegation relates back to an earlier date than its original appearance. On July 22, 1985, he intervened[20] in the suit brought by Patton and LeMaire. On the authority of TEX. CIV. PRAC. & REM. CODE § 16.068 he seeks the benefit of their prior filing date. This section does not allow a relation back for wholly new plaintiffs. *Transport Inc. Co. v. Jaeger*, 534 S.W.2d 389 (Tex. Civ. App. -- Houston [1st Dist.] 1976, writ ref'd n.r.e.); *see* 2 R. McDONALD, TEXAS CIVIL PRACTICE § 8.12.3 (rev. 1982). Point of error 39 is sustained.

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[20] The parties apparently recognize a July 19 filing date, although the file mark indicated a July 22 filing. The discrepancy is irrelevant for our purposes, however.

The next point of error invokes the same statute against Zeissig and Scherfenberg. They filed an independent suit on February 28, 1985, exactly two years after their discovery date as found by the jury. MBank attacks the jury's finding as against the great weight and preponderance of the evidence. Zeissig and Scherfenberg first pleaded fraud on February 25, 1986, so they seek a relation back to their original filing date in order to avoid limitations. TEX. CIV. PRAC. & REM. CODE § 16.068. We agree with Zeissig and Scherfenberg that the claim relates back. *Leonard v. Texaco*, 422 S.W.2d 160 (Tex. 1967) is directly on point. Point of error forty is overruled. It is therefore necessary to assess the evidentiary support for the jury's finding in special issue 49 of a February 28, 1983 discovery date, assailed in the 41st point of error.

MBank points to the end of October 1982 as the latest possible discovery date. By that time Abilene National Bank had become MBank Abilene, and new officers had replaced Earney and Kington. Earney's successor, Ralph Ridlinghafer, refused to fund the loan. The plaintiffs then sought an alternate source of financing by proposing a deal with Trio Tubular, a deal which never materialized because the bank would not subordinate its interest in the Lobo wells.

By this time, all agree, the bank regarded Lingen's stock as worthless. Since the plaintiffs did not actually dispose of their stock until February 28, 1983, however, they claim the limitations clock did not start running until then. Resolution of this issue turns on the following question: what did the plaintiffs know and when did they know it? In passing on this point we shall detail the relevant evidence, pursuant to *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986).

The statute of limitations begins running upon discovery of the fraud or when it becomes discoverable through the exercise of reasonable diligence. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981). Earney's original failure to fund occurred as of about May 1982. Patton testified that Earney first started holding him off in May, and LeMaire said it might have been in late April. Earney himself remembered the troubles starting in May and informed Patton and LeMaire by sometime in July. LeMaire agreed that Earney specifically informed them of the illegality problem about July 29, and Patton's testimony corroborated this. They responded by negotiating with Trio Tubular.

LeMaire testified to having told Scales, Zeissig, and Scherfenberg immediately upon learning of the illegality. Scherfenberg gave the following testimony:

> Q. When did you first learn that Abilene National Bank would not be funding this $3,000,000.00 to Lingen?
>
> A. Well, it's very difficult to say; but I if I want to estimate, it was either in August or September, sometime around that time in 1982, yes

Zeissig made similar remarks:

> Q. Were you ultimately told by anyone at MBank Abilene that the funds would not be lent, the $3,000,000.00 would not be lent to Lingen?
>
> A. I've been asked that question before, and I've thought about this ever since, and I

> have to say, yes. I think it was said eventually, but the way it was said and as the events developed, at least at the time, it didn't call my attention. It was kind of academic at some point when it was finally said. And the earliest point I can nail it down to have been said was the meeting we had with Mr. Ridlinghafer in preparation of the board meeting which was somewhere in November or late November, early December 1982.
>
> Q. Now, at the time that Mr. Ridlinghafer indicated to you that the bank would not be lending the $3,000,000.00, did he give you any reasons why the money would not be lent?
>
> A. Yes. The reason was that then the situation of Lingen, which we all knew was bad, very bad, he wouldn't have lent anyone money at that point in time.

The evidence overwhelmingly indicated that not only would a reasonable person have discovered the bank's refusal, but that these plaintiffs actually did. For this precise reason they exercised commendable diligence by pursuing the Trio Tubular alternative, a noble "final attempt ... to stave off total collapse." Brief of Appellees Scales, Zeissig and Scherfenberg at 13.

Appellees go on to distinguish fraud from breach of contract, arguing that damages were not incurred until they sold their stock on February 28, 1983. If their contention has merit, then the shareholders could still hold their stock today with the statute perpetually tolled. This is too extravagant to be maintained.

> The fallacy of such a contention is at once apparent, for it will readily be seen that in any similar case of fraud, it could with as much legal propriety be claimed that a delay of seven, eight, or even ten years must be extended to the defrauded party before the statutes of limitation would be put in operation against his cause of action, with the probable consequence of bringing into the case many conditions and circumstances not directly attributable to the fraud.

Quinn v. Press, 135 Tex. 60, 64-65, 140 S.W.2d 438, 440 (1940). Texas law has consistently refused to seek an arbitrary date such as formal reduction of damages to a final judgment. *American Indemnity Co. v. Ernst*, 106 S.W.2d 763, 765 (Tex. Civ. App. -- Waco 1937, writ ref'd); *see Wise v. Anderson*, 163 Tex. 608, 359 S.W.2d 876 (1962); *Houston Water Works v. Kennedy*, 70 Tex. 233 (1888). We sustain the 41st point of error. It is unnecessary to address the remainder of MBank's complaints about the fraud part of the case.

VII. TORTIOUS INTERFERENCE

Special issue 11 headed a cluster of inquiries about tortious interference. Patton and LeMaire alleged the bank wrongfully interposed itself between them and ITAG, a prospective investor in Lingen. MBank alleges in point of error 56 that Patton and LeMaire pleaded ont tort (interference with contract) but procured jury findings on another (interference with business relations). Interference with contract consists of four elements:

> (1) existence of a contract subject to interference,

(2) willful and intentional interference,
(3) proximate cause, and

(4) damages

Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 369 (Tex. App. -- Texarkana 1986, writ ref'd n.r.e.); *Armendariz v. Mora*, 533 S.W.2d 400, 404 (Tex. Civ. App. -- El Paso 1977, writ ref'd n.r.e.) Interference with business relations consists of four different elements:

(1) a reasonable probability the plaintiff would have entered into a contractual relationship,

(2) defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming the plaintiff,

(3) the defendant was not privileged or justified, and

(4) resulting damages.

Lone Star Steel Co. v. Wahl, 636 S.W.2d 217, 222 (Tex. App. -- Texarkana 1982, no writ). Chief Justice Evans has noted one of the differences, that "unless there is some contractual understanding, a party to a business relationship is not protected from lawful competition, only against malicious or unlawful interference." *Bray v. Squires*, 702 S.W.2d 266, 277 (Tex. App. -- Houston [1st Dist.] 1985, no writ); *accord Martin v. Phillips Petroleum Co.*, 455 S.W.2d 429, 435 (Tex. Civ. App. -- Houston [14th Dist.] 1970, no writ).

The jury was asked about a hybrid sort of theory, neither interference with business relations nor interference with contract. Nowhere did the charge refer to the need for finding the existence of a contract. Patton and LeMaire do not appear to dispute this, inasmuch as their brief consistently accuses the bank of meddling in the *negotiations* with ITAG. Brief at 80-81. Indeed their point is that the bank "controlled the closing in which Patton and LeMaire sold their stock in Lingen to ITAG and Patton and LeMaire were forced to accept terms disadvantageous to them but advantageous to MBank." Id. at 80. We sustain point of error 56.

The 60th point of error complains that special issue 13 erroneously served as a consolidated damage inquiry for both the fraud and the tortious interference claims. Because we have sustained MBank's limitations pleas as to fraud, no damage finding for fraud may stand. Since special issue 13 failed to segregate fraud damages from tortious interference damages, we cannot tell whether the jury made any findings regarding the latter. Accordingly the tortious interference cause of action must be retried. We sustain point of error 60. It is unnecessary to reach any other complaints as to tortious interference.

VIII. DTPA

A. LIMITATIONS

MBank's first attack on the DTPA part of the judgment is based on the statute of limitations.[21]

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[21] Patton and LeMaire say a four year statute should apply to all DTPA claims relating to breach of warranty, because warranty sounds in contract and contract actions implicate a four year period. This contention is plainly fallacious. TEX. BUS. & COMM. CODE §

Scales. The 63rd point of error invokes the statute against Scales. The jury found DTPA violations as to Scales in special issues 23-28. The jury also made findings of discovery dates which would preclude his recovery on all but special issue 26. The trial court apparently disregarded the jury's answer as to the discovery date for special issue 24.[22]

Inspection of the verdict shows that Scales may not recover on special issues 23 or 28. The face of the verdict also indicated a bar as to special issue 24, but the court disregarded that finding. We agree with the trial judge that no evidence supports the jury's response. Scales is not barred by limitations from recovering on special issue 24. However, limitations does bar recovery on special issues 25 and 27. Scales seeks to avoid this result by arguing for a relation back to his original plea in intervention. He intervened solely as Lingen's assignee on an isolated complaint about an escrow account. That intervention is too slender a red to support relation back, even on the very forgiving rationale of *Leonard v. Texaco* which we have already followed to defeat a limitations plea by MBank. The corporate cause of action arising from an escrow dispute furnishes no basis for maintaining Scales' late filed DTPA claim: *See* 2 R. McDONALD, TEXAS CIVIL PRACTICE § 8.12.2 (rev. 1982). Point of error 63 is sustained in part.

Zeissig and Scherfenberg. The 64th point of error asks for a limitations bar to recovery on special issues 23, 24 and 28 by Zeissig and Scherfenberg. For the reasons just

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17.565.

[22] The transcript contains no order expressly disregarding the finding, but the appellate briefs so characterize the court's action and the judgment seems to conform to this view. We therefore have no reason to challenge it. TEX. R. APP. P. 74(f).

given, we sustain this point as to issues 23 and 28 only. It is overruled as to issue 24.

Patton and LeMaire. The 65th point of error asks for a limitations bar to recovery on special issues 21-24 by Patton and LeMaire. For the reasons given above, we overrule this point as to special issue 24. It is sustained as to issues 21-23 and 28.

Point of error 66 raises a great weight and preponderance challenge to the discovery dates found by the jury as to the following:

(1) special issues 25, 26, and 27 for all plaintiffs, and

(2) special issue 20 for Patton and LeMaire.

Before addressing MBank's complaint we pause to consider matters raised by Patton and LeMaire in their brief. We have already rejected their call for application of a four year statute to the DTPA claims. They next argue a release which they signed tolled the statute from February 28, 1983 until June 17, 1984. MBank responds that Patton and LeMaire elsewhere attempt to escape the effect of the release. Thus MBank says Patton and LeMaire cannot prevail, since an ineffective release would not impede operation of the statute and an effective one would discharge the claims directly. For reasons given below, we uphold the jury's findings of ineffectiveness; the release is therefore immaterial.

Patton and LeMaire also say the pertinent discovery dates are supported by no evidence or insufficient evidence. (We have already found no evidence to support the jury's finding as to issue 24). We find there is sufficient evidence to support the dates found by the jury. Patton and LeMaire also attack the verdict for failing to inquire when their causes of action arose or when they discovered the relevant wrongs. We have inspected the wording of special issue 49 and find it facially adequate to support a judgment of limitations.

Scales, Zeissig and Scherfenberg devote only five lines to defending the trial court's disregard of the jury answers. They make no record references in support of that action. Neither can we discern any basis for ignoring the jury's findings. We sustain point of error 66.

B. CONSUMER STANDING

The next two points of error challenge the plaintiffs' standing as consumers to assert DTPA claims. MBank says the plaintiffs did not seek or acquire goods or services by purchase or lease. *See* TEX. BUS. & COMM. CODE § 17.45(4). The core of this argument is that money is neither a good nor a service; consequently a pure loan transaction lies outside the DTPA. The supreme court has indeed so held in *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169 (Tex. 1980). This case, however, has been limited to its facts. *Knight v. International Harvester Corp.*, 627 S.W.2d 382, 388 (Tex. 1982). Subsequent opinions lead to the inescapable conclusion that standing is proper in this case. *See La Sara Grain v. Fist Nat'l Bank of Mercedes*, 673 S.W.2d 558 (Tex. 1984); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705 (Tex. 1983). "The economic realities of the banking relationship, when coupled with the social policies embodied in the DTPA, mandate that courts turn their emphasis in such cases away from the artificial standing issue and focus on the merits of the customer's complaint." *Krahmer, Lovell, & McCormick, Banks and the Deceptive Trade Practices Act*, 18 TEX. TECH. L. REV. 1, 44 (1987). We overrule points of error 67 and 68.

C. LACK OF PLEADINGS

Point of error 69 asserts that Scales, Zeissig, and Scherfenberg should be unable to recover on special issues 24, 25, and 27 because they failed to plead the relevant acts. Our disposition of the limitations questions poses an independent bar as to issues 25 and 27, but we must reach this complaint since the trial court awarded judgment n.o.v. on issue 24.

These three plaintiffs went to trial without having pleaded the pertinent violations. After the close of the evidence Patton and LeMaire sought and obtained leave to add certain DTPA allegations. Scales, Zeissig, and Scherfenberg then requested similar trial amendments, but the trial court refused. When the court nevertheless included the corresponding special issues in the charge, MBank objected, The court overruled the objection and ultimately rendered judgment for the three plaintiffs on those issues. The three plaintiffs maintain the trial judge actually granted the amendment, although they offer no explanation for the alleged error in the statement of facts. We do not doubt the sincerity of this claim, but we are limited in our review to the contents of the record. Point of error 69 is sustained.

The 70th point of error says Patton and LeMaire filed to plead the acts inquired about in special issue 23. We need not reach this question because of our holding on limitations.

The 71st first point of error says Patton and LeMaire failed to plead the acts inquired about in special issues 17-20 and 22. A review of the pleadings shows this contention to be without merit. The 71st point of error is overruled.

D. AUTHORITY

The 72nd and 73rd points of error will be addressed in our discussion of Don Earney's authority.

E. LIMITING INSTRUCTIONS

In points of error 74 through 76 MBank says the trial court erred in failing to include limiting instructions in special issues 20 and 23-28. MBank wanted these DTPA questions to be confined to the alleged loan agreement and to fix the jury's attention on an identifiable party to the agreement. Instead the inquiries were somewhat open ended, in that they simply referred to "services" generally and failed to name the recipient of the contemplated loan. MBank condemns the issues, relying on *Scott v. Atchison, Topeka & Santa Fe Ry.*, 572 S.W.2d 273 (Tex. 1978) and *Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437 (Tex. Civ. App. - Dallas 1974, writ ref'd n.r.e.).

Of the relevant special issues, only issue 24 has survived the limitations attack. It is nevertheless appropriate to reach these complaints because they constitute a single conceptual argument, namely that the issues were "prejudicially multifarious." This challenge is similar to a complaint about variance. Under whatever name, it fails on the merits. *Scott* and *Shasteen* do not apply here. These special issues are clearly unobjectionable under broad submission practice. *See Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980). *See generally* Bragg, *The Court's Charge in DTPA Cases*, 18 TEX. TECH. L. REV. 113 (1987) (giving illustrations of broad issues). We overrule points of error 74 through 76.

F. DUPLICITOUS

Point of error 77 alleges special issues 17 and 18 are duplicitous, citing *Holmes v. J.C. Penney Co.*, 382 S.W.2d 472, 473 (Tex 1964). We agree. The two questions inquire about the same ultimate harm. The plaintiffs are entitled to one -- and only one -- recovery. Point of error seventy-seven is sustained.

G. OMITTED DEFINITION

Point of error 78 complains of special issue 27's failure to define "implied warranty." Because our holding on limitations necessitates a retrial on this question for four of the plaintiffs, we presume this problem is unlikely to arise again. It is therefore unnecessary to pass on this point of error.

H. EVIDENTIARY SUFFICIENCY

The next points of error go to issues 17-30 on the grounds of legal and factual insufficiency of the evidence.

Point of error 79 goes to issues 17-19, which inquired about unconscionable acts. MBank says there is no evidence or insufficiency of the evidence that its foreclosure process was unconscionable. MBank maintains it simply followed the proper statutory process, committing unilateral acts which cannot be regarded as unconscionable for DTPA purposes. We reject the unilateral act defense but must still decide whether these acts qualify as "glaringly noticeable, flagrant, complete and unmitigated." *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985); *see* TEX. BUS. & COMM. CODE § 17.45(5).

The supreme court has said that mere breach of contract does not automatically create a DTPA violation. *E.g. La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984). At the same time, impossibility of performance does not automatically preclude unconscionable conduct. *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 251 (Tex. 1983). The statute defines unconscionability as that which

> (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or
>
> (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

TEX. BUS. & COMM. CODE § 17.45(5). As to the first part of the definition, the plaintiffs grounded much of their case on their own expertise. For example, they spoke of their business reputation, their many years of experience. They testified -- over objection -- regarding valuation of their petroleum ventures and the losses incurred. It can hardly be said that they lacked knowledge. As to the second part, any disparity between value received and consideration paid must be more than mere breach of contract. The law does not make foreclosure so perilous. Just because "[n]early every breach of contract suit can be *pled* under DTPA unconscionability,"[23] that does not make every breach of contract a violation. We sustain point of error 79.

Point of error 80 goes to issues 20 and 23. The statute of limitations bars recovery on issue 23. As to issue

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[23] Alderman, Innovative Uses of the DTPA, 18 TEX. TECH. L. REV. 45, 67 (1987) (emphasis added).

20, our holding on limitations necessitates a new trial on the question of discovery date, unless *no* evidence exists with regard to the underlying violation. If *no* evidence supports the finding of a violation, it would be pointless to retry the question of when the plaintiffs should have discovered an act which never took place.

The record contains some evidence that the bank made the representations asked about in issue 20. We therefore turn to the matter of factual insufficiency. If we were to sustain this complaint, a retrial would be in order; but the same is true of overruling this complaint. For the plaintiffs to adduce evidence showing *when* they should have discovered the act, they will have to show the act occurred in the first place. It is thus unnecessary to assess the factual sufficiency of the evidence. We overrule this point of error as to legal insufficiency and need not consider the factual insufficiency portion.

Point of error 81 relates to issue 21, upon which recovery is barred outright by limitations. It is thus unnecessary to consider this point.

For the same reason we need not pass on point of error 82, which goes to issue 22.

The 83rd point of error goes to issue 24, which is unaffected by limitations. Patton and LeMaire have repeatedly characterized this case as a fraud case. MBank denies this, but insists that the jury should not have passed on the separate question of warranty. The bank argues that no warranty existed separate and apart from the loan contract. In the charge, the court defined warranty as a collateral promise which forms a basis of the bargain.

We reject MBank's arguments that there is no evidence of fraud or breach of contract, but we agree that the contract cannot be *both* a contract and a warranty. Patton and LeMaire rely on various assertions by Don Earney as creating warranties. These statements simply help define the scope of the contract, which we have upheld. If we were to find a warranty in addition to the contract, it is difficult to see how Patton and LeMaire could establish damages without creating a case of double recovery. Point of error 83 is sustained.

The 84th point of error goes to issue 25. The statute of limitations poses an outright bar to Scales' recovery. Our holding on limitations necessitates a retrial as to the other four plaintiffs. For the reasons given above we will pass only on the assertion of *no* evidence and not on the claim of factual insufficiency. The record contains some evidence supporting the jury's answer. We overrule this point of error in part and decline to consider the remainder.

Point of error 85 goes to issue 26. For the reasons given above we will pass only on the assertion of *no* evidence and not on the claim of factual insufficiency. The record contains some evidence supporting the jury's answer. We overrule this point of error in part and decline to consider the remainder.

The 86th point of error goes to issue 27. The statute of limitations poses an outright bar to Scales' recovery. For the reasons given in our discussion of point of error 83, we also sustain MBank's complaint that no independent warranty existed as to any of the plaintiffs.

Point of error 87 goes to issue 28. The statute of limitations poses an outright bar against all plaintiffs as to recovery on this issue. Because of our holding on limitations, it is unnecessary to consider this point.

The 88th point of error questions the legal and factual sufficiency of the evidence to support the jury's response to special issue 29. That issue asked whether the bank's conduct was a producing cause of harm with respect to the acts mentioned in special issues 17-28. Because MBank's brief refers us to its discussions under points of error 22 and 109-123, we will answer its arguments elsewhere.

The 89th point of error alleges the answers to special issue 30 rest only on conjecture. MBank points out an arithmetic coincidence, in that these damage findings can be calculated simply by apportioning the sums found in special issues 4(A), 9, 13(A) and 14 equally among the appropriate blanks in special issue 30. MBank concludes the jury must have taken those amounts and incorporated them into the DTPA portion of the verdict. We will not inquire into the mental processes of the jurors. To the extent that MBank is complaining of double recovery, we will address that argument elsewhere. Point of error 89 is overruled.

> Point of error 90 relates to the release and is taken up below.

Point of error 91 relates to DTPA damages. Its supporting argument consists of a one sentence reference to the discussions under points of error 18-21 and 109-123. We will address this argument elsewhere.

IX. AUTHORITY OF DON EARNEY

In points of error 11, 36, 53, 72, and 73 MBank complains of the charge's failure to have the jury determine the existence or scope of Earney's authority. The court submitted no issues or instructions relating to agency.

MBank accordingly regards the judgment as fatally flawed. The plaintiffs view the evidence as conclusively establishing Earney's authority to act for the bank, and we agree. This is a textbook example of actual authority. We overrule points of error 11, 36, 53, 72, and 73.

X. RELEASE

This part of the case relates to a release signed on February 28, 1983. As part of a massive restructuring transaction, MBank entered into a new agreement with Patton and LeMaire. By the terms of that agreement the bank released Patton and LeMaire from their personal obligations on certain promissory notes, and also undertook to set up an escrow account for production payments to be made to Patton and LeMaire. Various other aspects were involved, the most significant being a release of all legal claims against the bank "arising out of or in connection with any circumstances occurring prior to the date hereof."

> MBank attacks the judgment with three arguments:
>
> (1) the release is effective on its face,
>
> (2) the jury's findings in support of the plaintiffs' affirmative defenses are wrong, and
>
> (3) the charge was defective.

We consider these arguments in turn.

In points of error 12, 37, 54, 61, and 90 MBank simply asks us to give effect to the release. Compliance would bar the plaintiffs from recovering on several of their theories: breach of contract, promissory estoppel, fraud, tortious interference, and (in part) DTPA. The instrument appears valid on its face and nothing prevents operation of the release except the three affirmative defenses raised by Patton and LeMaire.

Patton and LeMaire asserted that (1) MBank materially breached the agreement, that (2) the agreement was procured by fraud, and that (3) they signed it under duress. The jury so found and the trial court therefore refused to regard the release as effective. In order for MBank to avoid the effects of those answers it is not enough to find fault with one or two of them; we would have to find deficiencies as to all three, because survival of any single defense overcomes the release.

As to material breach we cannot say the evidence is insufficient to support the finding. MBank maintains nevertheless that any wrongful acts merely violated contractual covenants and not conditions. *See Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1 (Tex. 1976); *Texas City Refining, Inc. v. Universal Oil Prods. Co.*, 681 S.W.2d 303 (Tex. App. -- Houston [14th Dist.] 1984, no writ). In view of the lengthy instrument and the testimony of the witnesses, the jury was entitled to find material breach in this case. As Patton and LeMaire point out, the document itself makes performance subject to "the terms and conditions hereof." The jury properly passed on the question of material breach. We overrule points of error 92 and 93.

As to fraud and duress we cannot say the evidence is insufficient to support the findings. We overrule points of error 95 and 99. But this does not end our inquiry, because MBank claims the pertinent portions of the charge contained defective instructions.

First, the bank points out the omission of an instruction on *justified* reliance. In support appellant refers us to certain cases on promissory estoppel -- not fraud -- for the general proposition that reliance must be justified. This proposition is unexceptionable. The omission, however, must be regarded as harmless. *See* TEX. R. APP. P. 81(b). The last sentence of the fraud instructions tells the jury Patton and LeMaire were obligated to investigate the bank's representations only if they were so illogical as to make reliance unreasonable. There is at least an implication here that reliance ought to be justified. This is sufficient to soften the blow of the omission. Point of error 94 is overruled.

Point of error 97 is similar. It complains of the inclusion of instructions on fraudulent concealment and confidential relationship. The former instruction does not appear improper, but the latter is troubling because we discern no evidence whatsoever of a confidential relationship. On the contrary, it would be patently absurd to say Patton and LeMaire had such a relationship with Ralph Ridlinghafer or the bank. Patton and LeMaire had a relationship with Earney, to be sure, at least until he was deposed as head of the bank. His departure and the bank's regeneration under new management brought those days to an end. Indeed we have just held the evidence sufficient to support a finding of duress; it would be highly incongruous for duress to coexist with a confidential relationship. Again, however, the error was harmless. TEX. R. APP. P. 81(b). Point of error 97 is overruled.

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Second, the 96th point of error says the fraud instructions failed to limit the jury's consideration to representations properly pleaded and raised by the evidence. *See Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437, 439 (Tex. Civ. App. -- Dallas 1974, writ ref'd n.r.e.). The issue as submitted was proper under broad form practice. *See* TEX. R. APP. P. 277. The 96th point of error is overruled.

Finally, the 98th point of error says the charge failed to identify the elements of duress. Because we upheld the defenses of material breach and fraud, it is unnecessary to address this complaint.

XI. DEFAMATION

MBank posted foreclosure notices with respect to certain oil and gas properties held as collateral. Patton and LeMaire recovered judgment for defamation arising out of the contents of those notices, in the amounts of $25,000 each in actual damages and $1,750,000 each in exemplary damages. MBank attacks the judgment on constitutional, common law, evidentiary, and procedural grounds.

A. PLEADINGS

Points of error 100 through 102 say the pleadings fail to support the recovery. MBank points to the allegation of injury to reputation, in contrast to special issue 35 which referred to mental anguish, embarrassment, and humiliation. The variance is not sufficiently material to warrant reversal. TEX. R. APP. P. 81(b). We overrule point of error 100.

As to punitive damages, however, Patton and LeMaire went to trial on silent pleadings. MBank attacks the judgment as unsupported by proper pleadings. The judgment must conform to the pleadings. TEX. R. CIV. P. 301. Without such written pleadings the trial court may not submit the matter to the jury. TEX. R. CIV. P. 278 (formerly 279). Although the parties may try the matter by implied consent, *see* TEX. R. CIV. P. 67, MBank objected to submission of the issue and prevented trial by implied consent.

Here Patton and LeMaire simply did not file the appropriate pleadings. We would have a different case if they had sought punitive damages (in one amount) before trial and then amended their petition to seek a greater amount. *Cf. Dayton Hudson Corp. v. Altus*, 715 S.W.2d 670, 675 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.) (allowing the greater amount); *Burk Royalty Co. v. Walls*, 596 S.W.2d 932, 937-38 (Tex. Civ. App. -- Fort Worth 1980) (allowing the original amount only), *aff'd*, 616 S.W.2d 911 (Tex. 1978). In order to recover exemplary damages, Patton and LeMaire must be able to show proper written pleadings. This they seek to do by way of an oral trial amendment dictated to the court reporter. MBank says the court abused its discretion in allowing the amendment, and that the punitive damage award cannot stand. We must decide whether this oral trial amendment constitutes a proper written pleading, and if it does, whether the court erred in permitting it.

We first look to the rules. The Texas rules of civil procedure require pleadings to be written. Rule 45(d). Each pleading must be contained in one instrument of writing. Rule 46. The attorney of record is required to sign pleadings. Rule 57. Various other provisions clearly contemplate the filing of written documents. Rule 67 allows for trial of unpleaded issues by implied consent, in which cases amendments to the pleadings may be made. Without such amendments the court cannot properly put those issues to the jury. *See* rules 277, 279. Jury charge practice furnishes guidance in this domain. Objections to the charge may be made in either of two ways: "objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel...." Rule 272. It would seem from the rules that dictation is a distinct mode of tender, not a subset of presentation in writing.

We turn next to the cases. Patton and LeMaire cite *Missouri-Kansas-Texas R.R. Co. v. Gage*, 438 S.W.2d 879 (Tex. Civ. App. -- Fort Worth 1969, writ ref'd n.r.e.) as support for dictation practice. In *Gage* the plaintiff amended his damage allegations to clarify the measure of damages. The court agreed to let the plaintiff dictate the amendment at trial, with the understanding it would be "written up at a later date and filed as of the date it was dictated. . . ." Accordingly, the amendment was effective. *Id*. at 884. *Gage* is not the only decision in the Fort Worth court, however, One year later the court decided *Smith v. Davis*, 453 S.W.2d 340 (Tex. Civ. App. -- Fort Worth 1970, writ ref'd n.r.e.). The appellants had dictated a plea of limitations to the court reporter, and the court granted leave to file the amendment.

But because the record failed to show it was ever reduced to writing and filed as such, the appellate court held it was waived. *Id.* at 349. Reading *Gage* and *Smith* together, we do not find the former case on point.

The Corpus Christi court has taken a tack closer to *Gage* than to *Smith*. In *Hubler v. Oshman*, 700 S.W.2d 694 (Tex. App.--Corpus Christi 1985, no writ) the plaintiff dictated a request for legal fees into the record. The court of appeals relied on *Gage* in concluding that dictation alone -- without later reduction to writing -- sufficed. *Id.* at 699; *cf. Garcia v. Texas Dept of Human Serv.*, 721 S.W.2d 528, 530 (Tex. App.-- Corpus Christi 1986, no writ) giving effect to dictation where accompanied by writing). *Hubler*, however, was a trial to the court rather than to a jury. The Texarkana court has also refused to consider a dictated amendment which was never reduced to writing. *Welch v. Overton*, 416 S.W.2d 879, 882 (Tex. Civ. App. -- Texarkana 1967, writ ref'd n.r.e.).

We can find no authority for approving a practice which the rules do not. To the contrary, the rules expressly distinguish between writing and dictating. *See* rule 272. These requirements are mandatory, not even waivable by consent. *See, e.g., Missouri Pacific Railroad Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973) (objections to the charge must be made in accordance with the rules); *State v. Davis*, 228 S.W.2d 359 (Tex. Civ. App. -- Beaumont 1950, no writ) (same). Because Patton and LeMaire lack written pleadings to support the award of punitive damages, the award cannot stand. *See* rule 301; *Bedgood v. Madalin*, 600 S.W.2d 773, 776 (Tex. 1980). We sustain points of error 101 and 102.

B. ACTUAL INJURY

MBank maintains that any defamation was not libel per se, but rather libel per quod. In that case we may not presume damages. MBank therefore says there is insufficient evidence of actual damages. The trial court submitted the matter to the jury in a manner consistent with the view that actual injury must be demonstrated. Patton and LeMaire maintain this is nevertheless an instance of defamation per se, citing *Bell Publishing Co. v. Garrett Eng. Co.*, 141 Tex. 51, 170 S.W.2d 197 (Tex. Comm. App. 1943, opinion adopted). We regard the present case as far closer to *Hirshfield v. Fort Worth Nat'l Bank*, 83 Tex. 452, 18 S.W. 743 (1892), which held the erroneous publication of a default not actionable per se. *See also Fields v. Worsham*, 476 S.W.2d 421, 427 (Tex. Civ. App. -- Dallas 1972, writ ref'd n.r.e.).

Turning then to the record, we find no evidence of actual damage. Patton and LeMaire cite us to the record at S.F. 756-65, 1806-16, 2711, 2713. After scouring these excerpts, as well as the rest of the testimony, we perceive no proof of actual harm from the postings. The closest item is a bit of LeMaire's testimony. He was asked to explain the injury he suffered as a result of "the failure to fund the loans and the consequences that flow from it." He concluded that his reputation and social life has indeed suffered, although he could not explain how:

> And the thing that bothers me most, these postings. It's not whether I know the people, but how many people saw these postings that I have no way of knowing who they are. And I don't have a chance to explain. Somewhere along the line, my reputation has been damaged.

If this case were a simple defamation suit, no one could seriously contend that a plaintiff could win a supportable verdict on such a slender reed. The existence of collateral questions about banking law and deceptive trade practices in no way justifies easing the standard of review of the libel issue.

The jury found $25,000 each in actual harm to Patton and LeMaire. Those findings float in midair. LeMaire's testimony above constitutes no more than a surmise, a scintilla. As for Patton, he cannot even fashion a surmise out of this record. We sustain points of error 103 and 104.[24]

C. CONSTITUTIONAL QUESTIONS

MBank also raises first amendment issues, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Upon review of the record it appears that MBank failed to preserve this claim for appeal. *See* TEX. R. APP. P. 52(a); TEX. R. CIV. P. 274 (requiring objections to the charge to be distinctly articulated). We overrule point of error 105.

D. QUALIFIED PRIVILEGE

MBank contends that any defamation was privileged, because it posted the foreclosure notices in good faith and in accordance with the law. *See* TEX. PROP. CODE § 51.002. We need not reach this question. MBank also challenges the finding of common law malice. We need not reach this question.

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[24] This holding furnishes an independent basis for deleting the award punitive damages, which we have already done because of lack of pleadings. *See Nabours v. Longview Savings & Loan Ass'n*, 700 S.W.2d 901 (Tex. 1985).

XII. DAMAGES

Points of error 109 through 131 assail various damage awards, other than for decrease in stock value.

First MBank assigns error to special issues 4, 13, and 30 with respect to loss of credit, damage to business reputation, and loss of employment. Although there are several specific complaints, the gist of appellant's argument is that the court improperly combined various legal theories of liability, some of which lacked the requisite pleadings. We have examined these contentions and reject them. We overrule points of error 109-114 and 118-120.

Next MBank challenges the sufficiency of the evidence supporting recovery for loss of credit, damage to business reputation, and loss of employment. We have again examined the record and disagree. We overrule points of error 115, 117, 121, and 122.

Appellant also attacks the trial court's failure to reduce to present value the damages to credit and business reputation. *See Sheshunoff & Co. v. Scholl*, 564 S.W.2d 697 (Tex. 1978); *Republic Bankers Life Ins. Co. v. Jaeger*, 551 S.W.2d 30 (Tex. 1976). Since the damages were unliquidated, however, we cannot tell whether a discount factor was actually omitted. Point of error 116 is overruled.

MBank raises an interesting argument in point of error 123. Relying on the classic case of *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821 (2d Cir. 1968), appellant makes the metaphysical point that legal causation must stop at some point. Otherwise the law would have to recognize recovery for the most remote and indirect consequences. *See* PROSSER ON TORTS § 43, at 297-300 (5th ed. 1984). There is no question but that the chain of proximate causation goes only so far, but this is not a negligence case. Foreseeability, therefore, has no place here. In our view the jury could properly have found as it did, and the trial court did not err in rendering judgment accordingly. We overrule point of error 123.

In point of error 124 MBank attacks the finding of metal anguish damages in special issue 33, which was predicated on finding DTPA violations in the cluster of special issues 17-28. MBank argues that because some of those findings in the DTPA cluster are infirm, and the verdict does not indicate *which* violations caused the mental anguish, recovery is unavailable. Patton & LeMaire point out MBank's failure to object to the charge on this ground; MBank assigns the error as "fundamental." *See Lucas v. Nesbitt*, 653 S.W.2d 883, 887 (Tex. App. -- Corpus Christi 1983, writ ref'd n.r.e.); *see also Lovelace v. Sabine Consolidated, Inc.*, 733 S.W.2d 648, 655 (Tex. App. -- Houston [14th Dist.] 1987, writ denied). We cannot tell which DTPA violations the jury found to support mental anguish damages. As a holding of this court, *Lovelace* controls. We sustain point of error 124. It is unnecessary to reach points 125-127.

In point of error 128 MBank claims the court improperly commented on the weight of the evidence in its instructions accompanying special issue 16. Not every comment causes harm, however. *See* TEX. R. APP. P. 81(b); *Alvarez v. Missouri-Kansas-Texas Railroad Co.*, 683 S.W.2d 375 (Tex. 1984). The sentence in question told the jury, "You may consider a variety of factors in determining what award of punitive damages is proper in order to punish and deter the bank from future wrongdoing." Nevertheless, the instructions say "if any" four times in an effort to avoid hinting at how the jury should answer. Construing the charge as a whole, we do not feel an improper judgment resulted. We overrule point of error 128. The next point of error makes the same complaint about special issue 37. Because MBank failed to object on this ground, we overrule point 129.

Next appellant challenges the sufficiency of the evidence supporting the findings of malice in special issues 15 and 36. We need not concern ourselves with the latter finding because we have previously deleted the award of punitive damages for defamation. The same is true of the former finding because of our remand of the tortious interference claims. We therefore do not reach points 130 or 131.

XIII. EVIDENTIARY RULINGS

Deferring points 132-136 until later, we move to points 137-150. MBank raises a variety of complaints about the court's rulings on evidentiary grounds. Although the court did rule against MBank in the vast majority of instances, that does not mandate a new trial. There is little point in detailing the specifics of each objection and offer. We have read the statement of facts from beginning to end and find no reversible error. Points of error 137-150 are overruled.

XIV. CONTINUANCE

Point of error 151 complains of the denial of appellant's motion for continuance. The standard of review is abuse of discretion. *Hernandez v. Heldenfels*, 374 S.W.2d 196 (Tex. 1963). At the heart of this matter is a Horst Bruer, whom MBank regards as a material witness for its case. Before trial Bruer had come to the U.S. from Germany in order to give his deposition. MBank completed direct examination of Bruer, but he left the deposition for a return flight to Germany before appellees completed their questioning. The parties were unable to reach a mutually satisfactory arrangement for finishing discovery with respect to Bruer. At trial the court granted a motion in limine to exclude any of Bruer's testimony because of the discovery situation. MBank unsuccessfully sought to use the deposition testimony or, alternatively, to continue the case until Bruer's deposition could be completed. The plaintiffs characterized the Bruer episode as discovery gamesmanship, alleging that MBank had essentially kept Bruer out of their reach until discovery was long finished, at which point MBank conveniently produced him for trial. The factual scenario was such that the trial court could properly have regarded MBank's behavior as improper. We overrule point of error 151.

XV. CUMULATIVE ERROR

Point of error 152 alleges that this case is riddled with enough error as to warrant a new trial on all issues. We disagree. Although we have found some error, a perfect trial is rarely encountered -- especially in massive commercial cases like this one. Our system of justice best serves society by upholding final judgments when possible. On the whole, we discern no cumulative error. Point 152 is overruled.

XVI. PREMATURE ENFORCEMENT

Point of error 153 seems to be beside the point. It alleges that the trial court should have granted MBank's motion to stay enforcement of judgment. Because the federal courts have ordered such a stay, however, pursuant to 12 U.S.C.§ 91, the question does not present a live controversy. We overrule point 153.

CONCLUSION

We uphold the recovery by Patton and LeMaire on their cause of action for breach of contract and promissory estoppel ($9.25 million each). Because Scales, Zeissig, and Scherfenberg failed to establish promissory estoppel as a bar to application of the statute of frauds, we reverse and render judgment that they take nothing on their contract action. TEX. R. CIV. P. 279

The fraud and tortious interference claims should be retried, except for Scales' fraud claim, which is barred by limitations. Retrial should also include the issue of discovery dates for Zeissig and Scherfenberg as to fraud.

Retrial should further include DTPA discovery dates: for Patton and LeMaire as to representation of grade of services; and for all plaintiffs as to representations that the agreement conferred rights which it did not in fact confer. We reverse and render judgment that the plaintiffs take nothing on their other DTPA claims. We reverse and render judgment that Patton and LeMaire take nothing in the way of damages for mental anguish on their DTPA claims, and in the way of actual and punitive damages for defamation.

We affirm that part of the judgment awarding attorneys fees to all plaintiffs. All points of error not expressly mentioned are overruled.

APPENDIX

SPECIAL ISSUE NO. 1

Did the Bank breach an agreement with Patton and LeMaire to loan funds?

To answer this question "Yes", you must find all the following elements from a preponderance of the evidence.

First, you must find that the Bank agreed with Patton and LeMaire upon the essential terms that it would loan the approximate sum of $3,000,000 to finance the operation of Lingen.

Second, you must find that the Bank failed to make such loans. If you find both elements from a preponderance of the evidence, then answer "Yes"; otherwise answer "No".

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 2

Do you find a preponderance of the evidence the following:

A. That the Bank promised Patton and LeMaire that it would loan the approximate sum of three million dollars ($3,000,000) to finance the operation of Lingen;

B. That the Bank reasonably foresaw or should have foreseen that Patton and LeMaire would rely on such promise, if any was made; and

C. That Patton or LeMaire relied to their detriment on the Bank's promise, if any was made?

If you find all of the foregoing from a preponderance of the evidence, the answer "Yes"; otherwise answer "No".

Answer "Yes" or "No".

Answer: Yes

If you have answered "Yes" to either Special Issue No. 1 or Special Issue No. 2, then answer the following Special Issue, otherwise; do not answer Special Issue No. 3.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the occurrence which you have found in answer to Special Issue No. 1 or Special Issue No. 2, were a cause or causes of actual damages, if any, to Patton's and LeMaire's business or property.?

Answer "Yes" or "No".

As to Special Issue No. 1, we answer: Yes

As to Special Issue No. 2, we answer: Yes

If you have answered Special Issue No. 3 "Yes" as to either Special Issues No. 1 or No. 2 or both of them, answer the following Special Issue; otherwise do not answer Special Issue No. 4.

SPECIAL ISSUE NO. 4

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Patton and LeMaire for their damages?

In answering this question, I instruct you that you will consider the following elements of damages, if any, providing you find from a preponderance of the evidence that they were the natural, probable, and reasonably foreseeable consequences at the time of the occurrences inquired about in Special Issue No. 1 or Special Issue No. 2 of this charge. A party may not recover damages if the loss it is complaining of was caused by his own actions or inactions. In answering this Special Issue No. 4, you shall not award any sum of money on any element if you have otherwise, under some other element in this Special Issue No. 4, awarded a sum of money for the same loss, that is, do not compensate twice for the same loss, if any, in this Special Issue No. 4.

A. Decrease, if any, in fair market value of plaintiffs' stock in Lingen.

B. Loss of employment, if any.

C. Loss of credit standing and borrowing power, if any.

D. Loss of business reputation, if any. "Fair Market Value" means the amount which would be paid in cash by a willing buyer to a willing seller, neither of whom is under any compulsion to either buy or sell.

Answer in dollars and cents, if any.

We answer:	Patton	LeMaire
A.	$6,375,000	$6,375,000
B.	$ 125,000	$ 125,000
C.	$1,500,000	$1,500,000
D.	$1,250,000	$1,250,000

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that Patton and LeMaire attempted to satisfy their obligation to Scales, Zeissig and Scherfenberg by going to the Bank to arrange financing for Lingen?

Answer: "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 6

Did the Bank breach an agreement with Scales, Zeissig and Scherfenberg to loan funds?

To answer this question "Yes" you must find all the following elements from a preponderance of the evidence.

First, you must find that the Bank agreed with Scales, Zeissig and Scherfenberg, through Patton and LeMaire, upon the essential terms that it would loan the approximate sum of $3,000,000 to finance the operation of Lingen.

Second, you must find that the Bank failed to make such loans. If you find both elements from a preponderance of the evidence, than answer "Yes"; otherwise answer "No".

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that the Bank made the agreement to lend funds with the intent to benefit Patton, LeMaire, Scales, Zeissig and/or Scherfenberg?

Answer "Yes" or "No" separately for each Plaintiff.

We answer:

Patton Yes

LeMaire Yes

Scales Yes

Zeissig Yes

Scherfenberg Yes

If you have answered "Yes" to either Special Issue No. 6 or Special Issue No. 7, then answer the following Special Issue, otherwise do not answer Special Issue No. 8.

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that the occurrences which you have found in answer to Special Issue No. 6 or Special Issue No. 7, were a cause or causes of actual damages, if any, to Scales, Zeissig and Scherfenberg's business or property?

Answer "Yes" or "No" for each Plaintiff.

Scales Yes

Zeissig Yes

Scherfenberg Yes

If you have answered Special Issue No. 8 "Yes", answer the corresponding part of the following special issue.

SPECIAL ISSUE NO. 9

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Scales, Zeissig and Scherfenberg for their damages?

In answering this Special Issue No. 9, I instruct you that you will consider only the decrease in fair market value of Plaintiffs stock in Lingen, if any, from the date of the occurrence providing you find from a preponderance of the evidence that it was the natural, probable, and foreseeable consequences of the occurrences inquired about in Special Issue No. 6 or Special Issue No. 7 of this charge. A party may not recover damages if the loss it is complaining of was caused by his own actions or inactions.

"Fair Market Value" means the amount which would be paid in cash by a willing buyer to a willing seller, neither of whom is under any compulsion to either buy or sell.

Answer in Dollars and cents, if any.

We answer:

Scales $ 5,000,000

Zeissig $ 5,000,000

Scherfenberg $ 2,250,000

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that the Bank committed any act or acts of fraud to the injury or damage of Plaintiffs?

Regarding "Fraud", you are instructed that it must be shown that a false representation of a material fact was made, with intent to induce a person, or corporation, to act upon it and that it was relied upon by such person or corporation and damages were thereby occasioned. The representation complained of must concern a material fact, as distinguished from a mere matter of opinion, judgment, probability or expectation. Hence it must be shown that material representation was made; that it was false; that when it was made, the person making it knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; that the person making it made it with the intention that it should be acted upon by the person to whom it was made and that such person, or corporation, acted in reliance upon it and that injury was thereby suffered.

An opinion as to the happening of a future event may constitute a representation of a material fact where the speaker purports to have special knowledge as to facts that will occur or exist in the future.

You are further instructed that "Fraud" is deducible from artifice and concealment as well as from affirmative conduct of a character such as tends to deceive. If there is a duty to speak, fraud may be found in the concealment of a material fact. If a person sustains toward another a position of trust and confidence, his failure to disclose facts that it is his duty to disclose is as much fraud as would be actual misrepresentation of true facts. That is to say, fraud may exist where there is a concealment of a material fact that should be divulged, as well as where there is a positive misrepresentation of material fact.

A relationship of trust and confidence exists where one party is in fact accustomed to being guided by the judgment or advice of the other, or is justified in placing confidence in the belief that such party will act in its interest.

You are further instructed that it is not necessary for the Plaintiffs to prove that the Bank's representations were the only reason for entering into a transaction. The representations must have been of such nature, weight and force that you can say that without them the Plaintiffs would not have taken the actions they did. In other words, in order to find that a misrepresentation was material, you must find that the misrepresentation induced the Plaintiffs to enter into the transaction.

You are further instructed that the Plaintiffs had a right to rely upon representations made by the Bank's employees or agents and were not obligated to make an investigation to determine the truth or falsity of the representations, unless they were so illogical that reliance upon the representations would be unreasonable.

Answer "Yes" or "No" separately for each Plaintiff.

We answer:

Patton _Yes_

LeMaire _Yes_

Scales _Yes_

Zeissig _Yes_

Scherfenberg Yes

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that the Bank committed any act or acts of interference with business relations with ITAG to the injury or damage of Patton and LeMaire?

You are instructed that any intentional invasion of or interference with property or property rights or with business relations with third parties causing injury without just cause or excuse constitutes "Interference". It must be shown that the conduct was willful and intentional and actual malice need not be shown.

Answer "Yes" or "No" separately as to Patton and LeMaire.

We answer:

Patton _Yes_

LeMaire _Yes_

If you have answered "Yes" to either "Special Issue No. 10 or No. 11, or both of them, then answer the corresponding part of the following Special Issue; otherwise, do not answer Special Issue No. 12.

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that such act or acts, if any, proximately caused any damage to Plaintiffs?

"Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer "Yes" or "No" separately for each question and each Plaintiff, wherein lines are provided.

We answer:

Special Issue No. 10	Special Issue No. 11
Patton Yes	Patton Yes
LeMaire Yes	LeMaire Yes
Scales Yes	
Zeissig Yes	
Scherfenberg Yes	

If you have answered "Yes" as to Special Issue No. 10, 11, or both, as to Patton, LeMaire, or both, answer the following Special Issue, otherwise do not answer Special Issue No. 13.

SPECIAL ISSUE NO. 13

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Patton and LeMaire for their damages, if any?

In answering this question, I instruct you that you will consider the following elements of damages, if any, providing you find from a preponderance of the evidence that they were proximately caused by the occurrence inquired about in Special Issue No. 10 and 11 of this charge. A party may not recover damages if the loss it is complaining of was caused by his own actions or inactions. In answering this Special Issue No. 13, you shall not award any sum of money on any element if you have otherwise, under some other element in this Special Issue No. 13, awarded a sum of money for the same loss, that is, do not compensate twice for the same loss, if any, in this Special Issue No. 13.

A. Decrease, if any, in fair market value of Plaintiffs' stock in Lingen.

B. Loss of employment, if any.

C. Loss of credit standing and borrowing power, if any.

D. Loss of business reputation, if any.

"Fair Market Value" means the amount which would be paid in cash by a willing buyer to a willing seller, neither of whom is under any compulsion to either buy or sell.

Answer in dollars and cents.

We answer:

	PATTON	LeMAIRE
A.	$ 6,375,000	$ 6,375,000
B.	$ 125,000	$ 125,000

C. $ 1,500,000 $ 1,500,000

D. $ 1,250,000 $ 1,250,000

If you have answered Special Issue No. 10 "Yes" as to Plaintiffs Scales, Zeissig and/or Scherfenberg, answer the following Special Issue.

SPECIAL ISSUE NO. 14

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Scales, Zeissig and/or Scherfenberg for their damages, if any.

In answering this Special Issue, I instruct you that you will consider only the decrease in fair market value of Plaintiffs' stock in Lingen, if any, from the date of the occurrence, providing you find from a preponderance of the evidence that such decrease was proximately caused by the occurrences inquired about in Special Issue No. 10 of this charge. A party may not recover damages if the loss it is complaining of was caused by his own actions or inactions, "Fair Market Value" means that amount which would be paid in cash by a willing buyer to a willing seller, neither of whom is under any compulsion to either buy or sell.

Answer in dollars and cents.

We answer:

A. Scales $ 5,000,000

B. Zeissig $ 5,000,000

C. Scherfenberg $ 2,250,000

SPECIAL ISSUE NO. 15

Do you find from a preponderance of the evidence that any of the acts inquired about in Special Issue No. 10 of No. 11 were actuated by malice on the part of the Bank? Answer separately as to No. 10 and No. 11

As used in this question "Malice" means an act done with intent to injure another or his property, and evidencing ill will, spite or evil motive.

Answer "Yes" or "No"

Answer:

A. Special Issue No. 10 Yes

B. Special Issue No. 11 Yes

If you have answered "Yes" to Special Issue No. 15 Part A, B or both, then answer the following question, otherwise do not answer Special Issue No. 16.

SPECIAL ISSUE NO. 16

What sum of money, if any, do you assess as exemplary damages, if any, against the Bank as a result of the conduct inquired about in Special Issues No. 10 or No. 11?

In determining the amount of an award for punitive and exemplary damages, if any, you should recall that the primary purpose of these type of damages are punishment and deterrence. You may consider a variety of factors in determining what award of punitive damages is proper in order to punish and deter the Bank from future wrongdoing.

Your award, if any, of exemplary damages should bear a reasonable relationship to the evidence of purposeful conduct by the Bank. Among the factors to be considered are the following: The nature of the wrong; the character of the conduct involved; the degree of culpability of the wrongdoer; the situation and sensibilities of the parties concerned; and the extent to which the conduct offends a public sense of justice and propriety.

If you find that Plaintiffs are entitled to an award of exemplary damages, you may include reasonable attorney's fees as part of the award. You are to determine what the reasonable value of attorney's services is in light of all the evidence before you.

Answer in dollars and cents separately for each Plaintiff and for each question, if any.

Answer:

SPECIAL ISSUE NO. 10	SPECIAL ISSUE NO. 11
Patton $ 875,000	Patton $ 875,000
LeMaire $ 875,000	LeMaire $ 875,000
Scales $ 1,500,000	
Zeissig $ 1,500,000	
Scherfenberg $ 0	

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that the Bank's acceleration of Patton's and LeMaire"s indebtedness constituted an unconscionable action or course of action?

An unconscionable action or course of action means an act or practice which, to a person's detriment takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree.

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that the Bank's demand to Patton and LeMaire for payment when it was not due constituted an unconscionable action or course of action?

An unconscionable action or course of action means an act or practice which, to a person's detriment takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree.

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that the Bank's demand to Patton and LeMaire for payment when it was not due constituted an unconscionable action or course of action?

An unconscionable action or course of action means an act or practice which, to a person's detriment takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree.

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 19

Do you find from a preponderance of the evidence that the Bank's posting for foreclosure the Patton and LeMaire property constituted an unconscionable action or course of action?

An unconscionable action or course of action means an act or practice which, to a person's detriment takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree.

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence that the Bank represented to Patton and LeMaire that the services of the Bank were of a particular standard, quality or grade when in fact they were not?

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 21

Do you find from a preponderance of the evidence that the Bank's representations to Patton and LeMaire disparaged the services of Continental Illinois Bank & Trust Company of Chicago by false or misleading representations of fact?

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 22

Do you find from a preponderance of the evidence that the Bank caused Patton and LeMaire to be confused or to misunderstand the affiliation, connection or association of the Bank with MCorp (formerly Mercantile Texas Corporation) or any of its subsidiary Banks.

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 23

Do you find from a preponderance of the evidence that the Bank represented to the Plaintiffs that the services of the Bank had benefits, characteristics, sponsorship or approval which they did not have?

Answer "Yes" or "No" separately for each Plaintiff.

We answer:

Patton Yes

LeMaire Yes

Scales Yes

Zeissig Yes

Scherfenberg Yes

SPECIAL ISSUE NO. 24

Do you find from a preponderance of the evidence that the Bank warranted to Plaintiffs that it would cause funds to be loaned on a timely basis and the Bank breached such warranty?

A "Warranty" is a promise, collateral to an agreement if it is part of the basis of the bargain for such agreement. Consider only the warranty, if any, made by the Bank directly to the respective Plaintiffs listed below.

Answer "Yes" or "No" separately for each Plaintiff.

We answer:

Patton Yes

LeMaire Yes

Scales Yes

Zeissig Yes

Scherfenberg Yes

SPECIAL ISSUE NO. 25

Do you find from a preponderance of the evidence that the Bank warranted that it could serve the Plaintiffs' financial service needs better than Continental Illinois Bank & Trust Company of Chicago and that the Bank breached such warranty?

A "Warranty" is a promise, collateral to an agreement if it is part of the basis of the bargain for such agreement. Consider only the warranty, if any, made by the Bank directly to the respective Plaintiff listed below.

Answer "Yes" or "No" separately for each Plaintiff.

We answer:

Patton Yes

LeMaire Yes

Scales Yes

Scherfenberg Yes

Zeissig Yes

SPECIAL ISSUE NO. 26

Do you find from a preponderance of the evidence that the Bank represented to Plaintiffs that any agreement conferred rights which the agreement did not have?

Answer "Yes" or "No" separately for each Plaintiff.

We answer:

Patton Yes

LeMaire Yes

Scales Yes

Zeissig Yes

Scherfenberg Yes

SPECIAL ISSUE NO. 27

Do you find from a preponderance of the evidence that the Bank impliedly warranted to Plaintiffs that it would act as a reasonably prudent and competent Bank and that the Bank breached such warranty?

A warranty is a promise, collateral to an agreement if it is part of the basis of the bargain for such agreement. Consider only the warranty, if any, made by the Bank directly to the respective Plaintiffs listed below.

Answer "Yes" or "No" separately for each Plaintiff.

We answer:

Patton Yes

LeMaire Yes

Scales Yes

Zeissig Yes

Scherfenberg Yes

SPECIAL ISSUE NO. 28

Do you find from a preponderance of the evidence that the Bank failed to disclose information concerning its services which was known at the time of a transaction and that such failure to disclose was intended to induce Plaintiffs into a transaction into which Plaintiffs would not have entered if such information had been disclosed?

Answer "Yes" or "No" separately for each Plaintiff.

Patton Yes

LeMarie Yes

Scales Yes

Zeissig Yes

Scherfenberg Yes

If you have answered "Yes" to any of Special Issues numbered 17 - 28, or all of them, than answer the corresponding part of the following Special Issue.

SPECIAL ISSUE NO. 29

Do you find from a preponderance of the evidence that the Bank's conduct inquired about in Special Issues Numbered 17 - 28, or all of them was a producing cause of injury, if any, to Plaintiffs' business or property?

"Producing cause" means, an efficient, exciting or contributing cause, which in natural sequence, produced injuries or damages complained of, if any. There can be more than one producing cause.

Answer "Yes" or "No" separately for each Plaintiff where a blank line is provided.

We answer:

	Patton	LeMaire	Scales	Zeissig	Scherfenberg
Spec. Issue #17	Yes	Yes			
Spec. Issue #18	Yes	Yes			
Spec. Issue #19	Yes	Yes			
Spec. Issue #20	Yes	Yes			
Spec. Issue #21	Yes	Yes			
Spec. Issue #22	Yes	Yes			
Spec. Issue #23	Yes	Yes	Yes	Yes	Yes
Spec. Issue #24	Yes	Yes	Yes	Yes	Yes
Spec. Issue #25	Yes	Yes	Yes	Yes	Yes
Spec. Issue #26	Yes	Yes	Yes	Yes	Yes
Spec. Issue #27	Yes	Yes	Yes	Yes	Yes
Spec. Issue #28	Yes	Yes	Yes	Yes	Yes

If you have answered Special Issue No. 29 "Yes" as to any of the Special Issues 17 through 28 or all of them, then answer the corresponding part of the following Special Issue No. 30.

SPECIAL ISSUE NO. 30

What sum of money, if any, if paid now in case, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiffs for their damages, if any.

In answering the question for Patton and LeMaire, I instruct you that you will consider the following elements os damage, if any, providing the damages were caused by the occurrences inquired about in Special Issues Numbers 17 through 28.

A. Decrease, if any, in fair market value of Plaintiffs' stock in Lingen.

B. Loss of employment, if any.

C. Loss of credit standing and borrowing power, if any.

D. Loss of business reputation, if any.

In answering this Special Issue for Scales, Zeissig and Scherfenberg, I instruct you that you will consider only the decrease in fair market value of their stock in Lingen, if any, from the date of the occurrence, providing the damages were caused by the occurrences inquired about in Special Issues 17 and 28.

A party may not recover damages if the loss it is complaining of was caused by his own actions or inactions. "Fair market value" means the amount which would be paid in cash by a willing buyer to a willing seller, neither of whom is under any compulsion to either buy or sell.

Answer in dollars and cents, if any, separately for each Plaintiff where a blank is provided.

	Patton	Lemair
Spec. Is. #17	$531,250	$531,250
Spec. Is. #18	$531,250	$531,250
Spec. Is. #19	$531,250	$531,250
Spec. Is. #20	$531,250	$531,250
Spec. Is. #21	$531,250	$531,250
Spec. Is. #22	$531,250	$531,250
Spec. Is. #23	$531,250	$531,250
Spec. Is. #24	$531,250	$531,250
Spec. Is. #25	$531,250	$531,250
Spec. Is. #26	$531,250	$531,250
Spec. Is. #27	$531,250	$531,250
Spec. Is. #28	$531,250	$531,250

	Scales	Zeissig	Scherfenberg
Spec. Is. #23	$833,333.34	$833,333.34	$375,000
Spec. Is. #24	$833,333.33	$833,333.33	$375,000
Spec. Is. #25	$833,333.33	$833,333.33	$375,000
Spec. Is. #26	$833,333.33	$833,333.33	$375,000
Spec. Is. #27	$833,333.33	$833,333.33	$375,000
Spec. Is. #28	$833,333.33	$833,333.33	$375,000

If you have answered Special Issue No. 29 "Yes" as to any of Special Issues 17 through 28, then answer the corresponding part of the following question.

SPECIAL ISSUE NO. 31

Do you find from a preponderance of the evidence that any of the conduct inquired about in Special Issues 17 through 28 was performed knowingly?

"Knowingly" means actual awareness of the falsity, deception or unfairness of the act or practice in question at the time such act or practice occurred. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

Answer "Yes" or "No".

Answer:

Special Issue No. 17	Yes
Special Issue No. 18	Yes
Special Issue No. 19	Yes
Special Issue No. 20	Yes
Special Issue No. 21	Yes
Special Issue No. 22	Yes
Special Issue No. 23	Yes
Special Issue No. 24	Yes
Special Issue No. 25	Yes
Special Issue No. 26	Yes
Special Issue No. 27	Yes
Special Issue No. 28	Yes

If you have answered any part of Special Issue No. 31 "Yes" then answer the corresponding part of the following Special Issue.

SPECIAL ISSUE NO. 32

What amount of money, if any, do you assess as additional damages against the Bank?

A jury may award additional damages to Plaintiffs if the conduct of the Bank was accomplished "knowingly". You may award no more than three times the actual damages in excess of $1,000 you found, if any, in the answer to Special Issue No. 30.

Answer in dollars and cents, if any, separately as to each Plaintiff where a line is provided.

	Patton	LeMaire	Scales	Zeissig	Scherfenberg
Spec. Is. #17	$0	$0			
Spec. Is. #18	$0	$0			
Spec. Is. #19	$0	$0			
Spec. Is. #20	$0	$0			
Spec. Is. #21	$0	$0			
Spec. Is. #22	$0	$0			
Spec. Is. #23	$0	$0	$0	$0	$0
Spec. Is. #24	$0	$0	$0	$0	$0
Spec. Is. #25	$0	$0	$0	$0	$0
Spec. Is. #26	$0	$0	$0	$0	$0
Spec. Is. #27	$0	$0	$0	$0	$0
Spec. Is. #28	$0	$0	$0	$0	$0

If you have answered any part of Special Issue No. 31 "Yes" answer the following Special Issue.

SPECIAL ISSUE NO. 33

What sum of money, if any, do you find from a preponderance of the evidence would fairly compensate Patton or

LeMaire for mental anguish, if any, suffered by them by reason of the conduct inquired about in Special Issue Numbers 17 through 28?

"Mental Anguish" means that keen and deeply felt suffering which results from some great grief. To constitute mental suffering or anguish, there must be more than mere worry, vexation, disappointment or anger and resentment.

Answer in dollars and cents.

Answer:

Patton	$ 25,000
LeMaire	$ 25,000

SPECIAL ISSUE NO. 34

Do you find from a preponderance of the evidence that the Bank defamed Patton and LeMaire by posting the notices of substitute trustee's sale which stated Patton and LeMaire had defaulted on the payment of their note which defamation proximately caused injury or damage to Patton and LeMaire?

"Defamation" means a writing tending to injure one's reputation and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach his honesty, integrity, or virtue, or reputation. In considering whether there is defamation, the words used in the publication must be considered as a whole, giving to all the words contained therein their ordinary meaning as read and construed by persons of ordinary intelligence.

"Proximate Cause" means the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

There may be more than one proximate cause of an event.

Answer "Yes" or "No" separately for Patton and LeMaire.

We answer:

Patton _Yes_

LeMaire _Yes_

If you have answered Special Issue No. 34 "Yes" then answer the following Special Issue.

SPECIAL ISSUE NO. 35

What amount of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Patton and LeMaire for damages, if any, suffered by reason of the defamation found above?

You are instructed that you may take into account actual monetary loss, actual damage in the form of mental anguish, embarrassment and humiliation, being guided by the following instruction: In this regard you are instructed that before any recovery can be awarded Patton and LeMaire for defamation, Patton and LeMaire must prove by a preponderance of the evidence that defamation complained of caused them some "actual injury". The term "actual injury" means actual monetary loss or actual damage in the form of mental anguish, embarrassment or humiliation. In order to recover for mental anguish, embarrassment, or humiliation, it is necessary to show something more than mere worry, anxiety, vexation, or anger.

Answer in dollars and cents, if any, separately for Patton and LeMarie.

Answer:

Patton $ _25,000_

LeMaire $ 25,000

SPECIAL ISSUE NO. 36

Do you find from a preponderance of the evidence that the acts inquired about in Special Issue No. 34 were actuated by malice on the part of the Bank?

As used in this question "Malice" means an act done with intent to injury another or his property, and evidencing ill will, spite or evil motive.

Answer "Yes" or "No".

Answer: Yes

If you have answered "Yes" to Special Issue No. 36, then answer following Special Issue.

SPECIAL ISSUE NO 37

What amount of money, if any, do you assess as exemplary damages against the Bank as a result of the conduct inquired about in Special Issue No. 34?

In determining the amount of an award of punitive and exemplary damages, if any, you should recall that the primary purposes of these type of damages are punishment and deterrence. You may consider a variety of factors in determining what award of punitive damages is proper in order to punish and deter the Bank from future wrongdoing.

Your award of exemplary damages, if any, should bear a reasonable relationship to the evidence of purposeful conduct by the Bank. Among the factors to be considered are the following: The nature of the wrong; the character of the conduct involved; the degree of culpability of the wrongdoer; the situation and sensibilities of the parties concerned; and the extent to which the conduct offends a public sense of justice and propriety.

If you find that Patton and LeMaire are entitled to an award of exemplary damages, you may include reasonable attorney's fees as a part of the award. You are to determine what the reasonable value of an attorney's services is in light of all the evidence before you.

Answer in dollars and cents separately for Patton and LeMaire.

Answer:

Patton $ 1,750,000

LeMaire $ 1,750,000

SPECIAL ISSUE NO. 38

Do you find from a preponderance of the evidence that the Bank materially breached its obligations under the agreements executed on February 28, 1983 between Patton, LeMaire and the Bank?

Answer "Yes" or "No".

Answer: Yes

SPECIAL ISSUE NO. 39

Do you find from a preponderance of the evidence that the Bank procured the execution of the agreements signed by the Bank, Patton and LeMaire on February 28, 1983 by fraud?

Regarding "Fraud", you are instructed that it must be shown that a false representation of a material fact was made, with intent to induce a person, or corporation, to act upon it and that it was relied upon by such person or corporation and damages were thereby occasioned. The representation complained of must concern a material fact, as distinguished from a mere matter of opinion, judgment, probability or expectation. Hence it must be shown that a material representation was made; that it was false; that when it was made, the person making it knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; that the person making it made it with the intention that it should be acted upon by the person to whom

it was made and that such person, or corporation, acted in reliance upon it and that injury was thereby suffered.

An opinion as to the happening of a future event may constitute a representation of a material fact where the speaker purports to have special knowledge as to facts that will occur of exist in the future.

You are further instructed that "Fraud" is deducible from artifice and concealment as well as from affirmative conduct of a character such as tends to deceive. If there is a duty to speak, fraud may be found in the concealment of a material fact that should be divulged, as well as where there is positive, misrepresentation of a material fact.

A relationship of trust and confidence exists where one party is in fact accustomed to being guided by the judgment of advice of the other, or is justified in placing confidence in the belief that such party will act in its interest.

You are further instructed that it is not necessary for Patton and LeMaire to prove that the Bank's representations were the only reason for entering into a transaction. The representations must have been of such nature, weight and force that you can say that without them Patton and LeMaire would not have taken the actions they did. In other words, in order to find that a misrepresentation was material, you must find that the misrepresentation induced Patton and LeMaire to enter into a transaction.

You are further instructed that Patton and LeMaire had a right to rely upon representations made by the Bank's employees or agents and were not obligated to make an investigation to determine the truth or falsity of the representations, unless they were so illogical that reliance upon the representations would be unreasonable.

Answer "Yes" or "No" separately as to Patton and LeMaire.

Answer:

Patton: Yes

LeMaire: Yes

SPECIAL ISSUE NO. 40

Do you find from a preponderance of the evidence that Patton and LeMaire executed the agreements dated February 28, 1983 because of duress?

The term "duress" as used in this charge means: Any coercion of another either mental, physical, or otherwise, causing him to act contrary to his own free will or to submit to a situation or condition against his own volition or interests. In other words, duress is the exercise of sufficient influence over another to destroy the free agency of the party influenced, and overcome his will to the extent that it will cause him to do that which he otherwise would not do. There can be no duress unless there is a threat to exercise a legal right in a wrongful manner, or which is a threat employed as an extortive measure, or which is an improper demand made in bad faith. Such threat must be directed at business interests, and one side must have involuntarily accepted the terms of the other. It must appear that the consent was actually induced by the pressure applied and would not have been given otherwise. This pressure does have to be such as to overcome the will of the person against whom it is applied. The coercive circumstances must have been the result of the acts of the opposite party, and the restraint caused by the threat must be imminent such that the circumstances permitted no other alternative but to accept the terms of another.

Answer: "Yes" or "No" separately as to Patton and LeMaire.

Answer:

Patton: Yes

LeMarie Yes

SPECIAL ISSUE NO. 41

Do you find from a preponderance of the evidence that a dispute existed between Patton and LeMaire, on the one hand, and the Bank, on the other hand, prior to February 28, 1983?

Answer: "Yes" or "No" separately as to Patton and LeMaire.

Answer:

Patton: Yes

LeMarie: Yes

SPECIAL ISSUE NO. 42

What sum of money, if any, would you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiffs for necessary legal services rendered in connection with this case as follows:

A. For preparation to file this case and for all proceedings in this court.

Patton: $ 147,008.50

LeMarie: $ 147,008.50

Scales: $ 67,990.83

Zeissig: $ 67,990.83

Scherfenberg: $ 67,990.83

B. Additionally, for all proceedings in the Court of Appeals, if this case is appealed.

Patton: $ 29,000

LeMarie: $ 29,000

Scales: $ 3,333.33

Zeissig: $ 3,333.33

Scherfenberg: $ 3,333.33

C. Additionally, for all proceedings in connection with an application to the Supreme Court for writ of error, if application is made.

Patton: $ 8600

LeMarie: $ 8600

Scales: $ 833.33

Zeissig: $ 833.34

Scherfenberg: $ 833.34

D. Additionally, for all proceedings in the Supreme Court if application for writ of error is granted.

Patton: $ 4300

LeMarie: $ 4300

Scales: $ 833.34

Zeissig: $ 833.33

Scherfenberg: $ 833.33

SPECIAL ISSUE NO. 43

Do you find from a preponderance of the evidence that MBank, as escrow agent, breached the escrow agreement?

You are instructed that you may only answer this issue yes if you find the following from a preponderance of the evidence:

a) That the Bank agreed to act as escrow agent under the terms of the Escrow Agreement;

b) That the Bank had actual knowledge of the terms and conditions of the Escrow Agreement.

c) That the Bank did not follow the terms and conditions of the Agreement.

Answer: "Yes" or "No".

Answer: Yes

If you have answered "Yes" to Special Issue No. 43, then answer the following Special Issue.

SPECIAL ISSUE NO. 44

Do you find from a preponderance of the evidence that the occurrence which you have found in answer to Special Issue No. 43 were a cause or causes of actual damages, if any, to Lingen's business or property?

Answer "Yes" or "No".

Answer No

If you have answered Special Issue No. 44 "Yes" answer the following question.

SPECIAL ISSUE NO. 45

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Lingen for its damages, if any?

In answering this Special Issue, I instruct you that you will consider damages, if any, that were natural, probable, and reasonably foreseeable consequences at the time of the occurrences inquired about in Special Issue No. 43.

Answer in dollars and cents, if any.

Answer: 0

SPECIAL ISSUE NO. 46

What sum of money, if any, would you find from a preponderance of the evidence would fairly and reasonably compensate Lingen for necessary legal services rendered in connection with this case as follows:

Answer each part separately in dollars and cents.

A. For preparation to file this case and for all proceedings in this court.

Answer: $ 0

B. Additionally, for all proceedings in the Court of Appeals, if this case is appealed.

Answer: $ 0

C. Additionally, for all proceedings in connection with an application to the Supreme Court for writ of error, if application is made.

Answer: $ 0

D. Additionally, for all proceedings in the Supreme Court if application for writ of error is granted.

Answer: $ 0

SPECIAL ISSUE NO. 47

Do you find from a preponderance of the evidence that the following unreasonably delayed in the assertion of their claims against the Bank?

Answer "Yes" or "No" as to each of the following:

A. Patton

Answer: No

B. LeMarie

Answer: No

C. Scales

Answer: No

D. Zeissig

Answer: No

E. Scherfenberg

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Answer: No

If you have answered any subpart of Special Issue No. 47 "yes", then answer the corresponding subpart of Special Issue No. 48: otherwise, do not answer Special Issue No. 48.

SPECIAL ISSUE NO. 48

Do you find from a preponderance of the evidence tha such unreasonable delay, if any, has worked injury, inconvenience or prejudice to the Bank or cause the Bank to change its positio to its detriment?

Answer "Yes" or "No" as to each of the following:

A. Patton

Answer: No

B. LeMaire

Answer: No

C. Scales

Answer: No

D. Zeissig

Answer: No

E. Scherfenberg

Answer: No

If you have answered any subpart of the Special Issue N 2, 10, 11, 17, 18, 19, 20, 21, 22, 23 24, 25, 26, 27, and "yes", then answer Special Issue No. 49; otherwise do not ans Special Issue No. 49.

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SPECIAL ISSUE NO. 49

Find from a preponderance of the evidence the earliest date on which the following discovered or in the exercise of reasonable diligence should have discovered the actions or representations, if any, inquired about in the Special Issues below identified.

Answer by stating the month, date and year for each of the following:

LeMaire

Spec. Is. # 2: Dec. 23, 1981

Spec. Is. #10: Feb. 28, 1983

Spec. Is. #11: Feb. 28, 1983

Spec. Is. #17: June 18, 1984

Spec. Is. #18: June 18, 1984

Spec. Is. #19: Oct. 15, 1984

Spec. Is. #20: Feb. 28, 1983

Spec. Is. #19: Oct. 15, 1984

Spec. Is. #20: Feb. 28, 1983

Spec. Is. #21: Feb. 23, 1982

Spec. Is. #22: Aug. 5, 1982

Spec. Is. #23: Oct. 19, 1982

Spec. Is. #24: Dec. 23, 1981

Spec. Is. #25: Feb. 28, 1983

Spec. Is. #26: June 18, 1984

Spec. Is. #27: Feb. 28, 1983

Spec. Is. #28: Feb. 23, 1982

Patton

Spec. Is. # 2: Dec. 23, 1981

Spec. Is. #10: Feb. 28, 1983

Spec. Is. #11: Feb. 28, 1983

Spec. Is. #17: July 17, 1984

Spec. Is. #18: July 17, 1984

Spec. Is. #19: Oct. 15, 1984

Spec. Is. #20: Feb. 28, 1983

Spec. Is. #21: Feb. 23, 1982

Spec. Is. #22: Aug. 5, 1982

Spec. Is. #23: Oct. 19, 1982

Spec. Is. #24: Dec. 23, 1981

Spec. Is. #25: Feb. 28, 1983

Spec. Is. #26: June 18, 1984

Spec. Is. #27: Feb. 28, 1983

Spec. Is. #28: Feb. 23, 1982

Scales

Spec. Is. #10: Feb. 28, 1983

Spec. Is. #23: Oct. 19, 1982

Spec. Is. #24: Dec. 23, 1981

Spec. Is. #25: Feb. 28, 1983

Spec. Is. #26: June 18, 1984

Spec. Is. #27: Feb. 28, 1983

Spec. Is. #28: Feb. 23, 1982

Zeissig

Spec. Is. #10: Feb. 28, 1983

Spec. Is. #23: Oct. 19, 1982

Spec. Is. #24: Dec. 23, 1981

Spec. Is. #25: Feb. 28, 1983

Spec. Is. #26: June 18, 1984

Spec. Is. #27: Feb. 28, 1983

Spec. Is. #28: Feb. 23, 1982

Scherfenberg

Spec. Is. #10: Feb. 28, 1983

Spec. Is. #23: Oct. 19, 1982

Spec. Is. #24: Dec. 23, 1981

Spec. Is. #25: Feb. 28, 1983

Spec. Is. #26: June 18, 1984

Spec. Is. #27: Feb. 28, 1983

Spec. Is. #28: Feb. 23, 1982

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed April 6, 1989.

Panel consists of Justices Murphy, Sears and Cannon.

Publish. TEX. R. APP. P. 90.

APPENDIX E

CAUSE NO. 52,567

HARRY LEMAIRE and § IN THE DISTRICT RICHARD
E. PATTON, § COURT OF
Plaintiffs, §
§
VS. § FORT BEND COUNTY,
§ TEXAS
MBANK ABILENE, N.A., §
Defendant. § 240th JUDICIAL DISTRICT

JUDGMENT

On the 19th day of May, 1986, came on to be heard the above entitled and numbered cause and appeared Plaintiffs and Counterdefendants Richard E. Patton (Patton) and Harry LeMaire (LeMaire), in person and by their attorneys of record, and appeared Plaintiffs Bert F. Scales, individually, and as Trustee under Bert F. Scales Trust, 1981 (Scales), Hilmar R. Zeissig, individually, and as Trustee under Agreement dated September 28, 1981, (Zeissig) and Dieter J. Scherfenberg, as Trustee under 1977 Children's Trust dated December 7, 1977, (Scherfenberg), in person and by their attorneys of record and announced ready for trial, and a jury having been previously demanded, a jury consisting of twelve good and lawful jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on special issues. The charge of the Court, including the special issues, and the verdict of the jury, are incorporated herein by reference for all purposes. It appearing to the Court that the verdict of the jury was for the Plaintiffs and Counterdefendants and against the Defendants and Counterplaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Patton have and recover from MBank Abilene, N.A. the sum of Twenty Million Six Hundred Ninety-one Thousand One Hundred Forty-Five and 13/100 Dollars ($20,691,145.13), which amount includes prejudgment interest on the sum of $12,330,000.00 at the rate of ten percent (10%) per annum compounded daily from February 28, 1983, to August 12, 1986, and prejudgment interest on the sum of $25,000.00 at the rate of ten percent (10%) per annum compounded daily from October 15, 1984 to August 12, 1986.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Patton have and recover from MBank Abilene, N.A. attorneys' fees in the sum of One Hundred Forty-Seven Thousand Eight and 50/100 Dollars ($147,008.50) for services rendered through the trial of this case, and the further sum of Twenty Nine Thousand Dollars ($29,000.00) in the event of an appeal to the Court of Appeals, and the further sum of Eight Thousand Six Hundred Dollars ($8,600.00) in the event a petition for writ of error is filed with the Supreme Court, and the further sum of Four Thousand Three Hundred Dollars ($4,300.00) in the event the Supreme Court grants a petition for writ of error.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this award of attorneys' fees is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that LeMaire have and recover from MBank Abilene, N.A. the sum of Twenty Million Six Hundred Ninety-One Thousand One Hundred Forty-Five and 13/100 Dollars ($20,691,145.13) which amount includes prejudgment interest on the sum of $12,330,000.00 at the rate of ten percent (10%) per annum compounded daily from February 28, 1983, to July 11, 1986, and prejudgment interest on the sum of $25,000.00 at the rate of ten percent (10%) per annum compounded daily from October 15, 1984, to August 12, 1986.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that LeMaire have and recover from MBank Abilene, N.A. attorneys' fees in the sum of One Hundred Forty-Seven

Thousand Eight and 50/100 Dollars ($147,008.50) for services rendered through the trial of this case, and the further sum of Twenty-Nine Thousand Dollars ($29,000.00) in the event of an appeal to the Court of Appeals, and the further sum of Eight Thousand Six Hundred Dollars ($8,600.00) in the event a petition for writ of error is filed with the Supreme Court, and the further sum of Four Thousand Three Hundred Dollars ($4,300.00) in the event the Supreme Court grants a petition for writ of error.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this award of attorneys' fees is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Scales have and recover from MBank Abilene, N.A. the sum of Eleven Million Five Hundred Nineteen Thousand Two Hundred Thirty and 65/100 Dollars ($11,519,230.65) which includes prejudgment interest on the sum of Seven Million Two Hundred Thousand Dollars ($7,200,000) at the rate of ten percent (10%) per annum compounded daily from February 28, 1983, to August 12, 1986.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Scales have and recover from MBank Abilene, N.A. attorneys' fee in the sum of Sixty-Seven Thousand Nine Hundred Ninety and 83/100 Dollars ($67,990.83) for services rendered through the trial of this case, and the further sum of Three Thousand Three Hundred Thirty-Three Dollars ($3,333.00) in the event of an appeal to the Court of Appeals, and the further sum of Eight Hundred Thirty-three and 33/100 Dollars ($833.33) in the event a petition for writ of error is filed with the Supreme Court, and the further sum of Eight Hundred Thirty-Three and 33/100 Dollars ($833.00) in the event the Supreme Court grants a petition for writ of error.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this award of attorneys' fees is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Zeissig have and recover from MBank Abilene, N.A. the sum of Eleven Million Five Hundred Nineteen Thousand Two Hundred Thirty and 65/100 Dollars ($11,519,230.65) which includes prejudgment interest on the sum of Seven Million Two Hundred Thousand Dollars ($7,200,000) at the rate of ten percent (10%) per annum compounded daily from February 28, 1983, to August 12, 1986.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Zeissig have and recover from MBank Abilene, N.A. attorneys' fees in the sum of Sixty-Seven Thousand Nine Hundred Ninety and 83/100 Dollars ($67,990.83) for services rendered through the trial of this case, and the further sum of Three Thousand Three Hundred Thirty-Three Dollars ($3,333.00) in the event of an appeal to the Court of Appeals, and the further sum of Eight Hundred Thirty-Three and 34/100 Dollars ($833.34) in the event a petition for writ of error is filed with the Supreme Court, and the further sum of Eight Hundred Thirty-Three and 33/100 Dollars ($833.33) in the event the Supreme Court grants a petition for writ of error.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this award of attorneys' fees is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Scherfenberg have and recover from MBank Abilene, N.A. the sum of Four Million Five Hundred Fifteen Thousand Two Hundred Fifty-Three and 79/100 Dollars ($4,515,253.79) which includes prejudgment interest on the sum of Three Million Two Hundred Forty Thousand Dollars ($3,240,000.00) at the rate of ten percent (10%) per annum compounded daily from February 28, 1983, to August 12, 1986.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Scherfenberg have and recover from MBank Abilene, N.A. attorneys' fees in the sum of Sixty-Seven Thousand Nine Hundred Ninety and 83/100 Dollars ($67,990.83) for services rendered through the trial of this case, and the further sum of Three Thousand Three Hundred Thirty-Three Dollars ($3,333.00) in the event of an appeal to the Court of Appeals, and the further sum of Eight Hundred Thirty-Three and 33/100 Dollars ($833.33) in the event a petition for writ of error is filed with the Supreme Court, and the further sum of Eight Hundred Thirty-Three and 33/100 Dollars ($833.33) in the event the Supreme Court grants a petition for writ of error.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this award of attorneys' fees is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that MBank Abilene, N.A. take nothing on its counterclaim against Patton and LeMaire and that Patton and LeMaire be in all things discharged and go hence without day with their costs.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Judgment hereby rendered shall bear interest at the rate of ten percent (10%) per annum from the date of Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all costs of Court expended or incurred in this cause are hereby adjudged against MBank Abilene, N.A. All writs and processes for the enforcement and collection of this Judgment or the costs of Court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED this the 12th day of August, 1986.

/s/
PRESIDING JUDGE

APPENDIX F
CONSTITUTIONAL AMENDMENTS

AMENDMENT V——GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII—— CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV——CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age is such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

§ 1819. Corporate powers

(a) in general

Upon June 16, 1933, the Corporation shall become a body corporate and as such have power——

First. To adopt and use a corporate seal.

Second. To have succession until dissolves by an act of Congress.

Third. To make contracts.

Fourth. To sue and be sued, and complain and defend, in any court of law or equity, State or Federal.

Fifth. To appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this chapter or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any office or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth To prescribe, by its Board of Directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted.

Eighth. To make examinations of and to require information and reports from depository institutions, as provided in this chapter.

Ninth. To act as receiver.

Tenth. To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency).

(b) Agency Authority

(1) Status

The Corporation, in any capacity, shall be an agency of the United States for purposes of section 1345 of Title 28, without regard to whether the Corporation commenced the action.

(2) Federal court jurisdiction

(A) In general

Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court.

(C) Appeal of remand

The Corporation may appeal any order of remand entered by any United States district court.

(D) State actions

Except as provided in subparagraph (E), any action—

(i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;

(ii) which involves only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

(iii) in which only the interpretation of the law of such State is necessary,

shall not be deemed to arise under the laws of the United States.

(E) Rule of construction

Subparagraph (D) shall not be construed as limiting the right of the Corporation to invoke the jurisdiction of any United States district court in any action described in such subparagraph if the institution of which the Corporation has been appointed receiver could have invoked the jurisdiction of such court.

(3) Service of process

The Board of Directors shall designate agents upon whom service of process may be made in any State, territory, or jurisdiction in which any insured depository institution is located.

(4) Bonds or fees

The Corporation shall not be required to post any bond to pursue any appeal and shall not be subject to payments of any filing fees in United States district courts or courts of appeal.

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(e) Agreements against Interests of Corporation

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution shall be valid against the Corporation unless such agreement—

(1) is in writing.

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the assets by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.